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Rob Warden

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Rob Warden*
John Seasly**

INTRODUCTION

Nineteen years ago, a *New Yorker* cartoon depicted a judge proclaiming, "Innocence is no excuse."[1] As humorous as it may have been, only a sadist could find anything amusing about the extent to which the cartoon reflected, and continues to reflect, the reality of U.S. criminal justice in general and capital punishment in particular.

For most of the nation's history, innocence was barely a footnote in the dominant narrative of criminal justice—exemplified by the distinguished liberal jurist Learned Hand's assertion in 1923 that:

> Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[2]

Since the advent and advance of DNA forensic technology in the late twentieth century,[3] the "unreal dream" has given way to a nightmare of unintended consequences—of which the most thoroughly documented is false convictions.[4] As of June 2019, 161 prisoners sentenced to death under laws enacted after the U.S. Supreme Court struck down all state death-penalty laws in 1972[5] had been exonerated based on substantial claims of innocence.[6]

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* Executive Director Emeritus, Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern Pritzker School of Law; Co-founder, National Registry of Exonerations; Co-founder, Injustice Watch, a Chicago-based investigative journalism project focusing on criminal justice reform.
** Reporter, Injustice Watch. Seasly received a BA in Journalism from Indiana University in 2011 and an MS in Journalism from Northwestern University in 2014.
[1] J.B. Handelsman, *Innocence Is No Excuse*, NEW YORKER, Aug. 21, 2000, at 142.
[2] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).
[3] *See* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 2 (Daniel S. Medwed ed., 2017) ("The first use of DNA technology to free an innocent defendant in the United States occurred in 1989.").
[4] Since the advent of the DNA forensic age, more than 2,400 false convictions have been documented. NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited May 23, 2019).
[5] Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).
[6] *Innocence Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/innocence (last visited June 6, 2019). The list includes the names of 165 exonerated persons, but four were convicted under pre-1972 laws. *Id.*

A second—worse—unintended consequence of capital punishment is the execution of the falsely accused and convicted, an inevitability that has been acknowledged officially in only three cases, involving four defendants, whose executions long predate the current laws,[7] while a greater number of likely mistaken executions has not been acknowledged.[8] A third unintended consequence is botched executions, of which history is replete with examples.[9] Scholarly research suggests that upwards of three percent of all executions in the United States between 1890 and 2010 were botched.[10]

But there is a fourth unintended consequence: cases of unrequited innocence, in which convicted men and women sentenced to death have not been exonerated despite compelling evidence of innocence.[11] Capital cases in the fourth category are the focus of this Article, which does not purport to be a definitive study but rather a compilation of anecdotal evidence of the lengths to which the criminal justice system sometimes goes to avoid acknowledging the error of its ways. Although it is impossible to determine innocence or guilt in any case beyond doubt, we believe that the twenty-four cases

[7] William Jackson Marion was hanged in Nebraska in 1887 and received a full pardon in 1987. In the Matter of a Posthumous Pardon for William Jackson Marion, Mar. 25, 1987 (granted by Neb. Gov. Robert Kerrey on the 100th anniversary of Marion's hanging) (on file with authors). Thomas and Meeks Griffin were electrocuted in South Carolina in 1913 and received full pardons in 2009. Leonard Green, *Race Prof Clears 2 in '13 Slay*, N.Y. POST, Oct. 15, 2009, at 8. Joe Arridy died in the Colorado gas chamber in 1939 and received a full pardon in 2011. Press Release, Office of Gov. Bill Ritter Jr., Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s (Jan. 7, 2011), https://deathpenaltyinfo.org/documents/ArridyPardon.pdf.

[8] *See* Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194, 249 (2018) (entry dated May 10, 1984) (James Adams, Fla.); *id.* at 249–50 (entry dated Sept. 10, 1984) (Timothy George Baldwin, La.); *id.* at 254 (entry dated May 20, 1987) (Edward Earl Johnson, Miss.); *id.* at 255 (entry dated Mar. 15, 1988) (Willie Jasper Darden, Fla.); *id.* at 256 (entry dated Dec. 7, 1989) (Carlos DeLuna, Tex.); *id.* at 257 (entry dated May 4, 1990) (Jesse Joseph Tafero, Fla.); *id.* at 259 (entry dated May 12, 1993) (Lionel Torres Herrera, Tex.); *id.* at 260–61 (entry dated Aug. 24, 1993) (Ruben M. Cantu, Tex.); *id.* at 263 (entry dated May 17, 1995) (Girvies Davis, Ill.); *id.* at 264–65 (entry dated June 21, 1995) (Larry Griffin, Mo.); *id.* at 267 (entry dated July 23, 1997) (Joseph Roger O'Dell III, Va.); *id.* at 267–68 (entry dated Apr. 3, 1997) (David Wayne Spence, Tex.); *id.* at 270–71 (entry dated Mar. 10, 1999) (Roy Michael Roberts, Mo.); *id.* at 273 (entry dated June 22, 2000) (Shaka Sankofa, Tex.); *id.* at 278 (entry dated Feb. 17, 2004) (Cameron Todd Willingham, Tex.); *id.* at 288 (entry dated Sept. 21, 2011) (Troy Anthony Davis, Ga.).

[9] Recent examples are the executions of Dennis McGuire in Ohio in 2014, Erica Goode, *After a Prolonged Execution, Questions over 'Cruel and Unusual'*, N.Y. TIMES, Jan. 18, 2014, at A12, Clayton D. Lockett in Oklahoma in 2014, Mark Berman, *Inmate Dies Following Botched Oklahoma Execution, Second Execution Delayed*, WASH. POST (Apr. 29, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/04/29/oklahoma-execution-botched-inmate-still-dies-second-execution-delayed/?utm_term=.351f0c80f41b, and seventy-two-year-old Brandon Astor Jones in Georgia in 2016, *Georgia Executes Its Oldest Death Row Inmate at 72*, TIMES & TRANSCRIPT (New Brunswick), Feb. 4, 2016, at B6.

[10] Of 8,776 U.S. executions from 1890 through 2010, 276 were botched. AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 179–210 (2014).

[11] We have adopted the National Registry of Exoneration's definition of "exoneration"—that a convicted person has been "relieved of all legal consequences of [his or her] conviction through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered." SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 6 (2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

profiled in this Article, involving twenty-five condemned men and women,[12] are sufficient to establish that unrequited innocence is a real and serious problem.

The criteria for inclusion among our profiles are simply that the prisoner was sentenced to death more than fifteen years ago—a limit we set on the theory that the records of more recent cases are unlikely to be sufficiently developed to enable meaningful profiling—and that he or she has not been exonerated despite affirmative evidence of innocence. Eleven of the defendants in the profiled cases remain on death row.[13] Three died while still under death sentences.[14] Five received sentence reductions but remained in prison.[15] Six were released but not exonerated.[16]

The profiles are presented in chronological order by the date of the crime rather than on the strength of the facts supporting the likelihood that the conviction was false. Following the profiles, we discuss what might be done to address the problems posed by the profiled cases.

PROFILES IN UNREQUITED INNOCENCE

1. Sonia Jacobs—Florida

Phillip Black, a Florida state trooper, and Donald Irwin, a Canadian constable who was visiting Black, were shot to death at an Interstate 95 rest stop in Broward County on February 20, 1976.[17] Sonia "Sunny" Jacobs, a mother of two, was convicted of the crime.[18] Her jury recommended a life sentence, but the judge—M. Daniel Futch, Jr., known as "Maximum Dan"[19]—sentenced her to death.[20] A month earlier, Futch had

[12] One of the profiled cases involves two condemned men. *See infra* profile No. 7 (Thomas Jesse Ward & Karl Allen Fontenot, Okla.).

[13] *Infra* profile Nos. 2 (Jonathan Bruce Reed, Tex.), 6 (Kevin Cooper, Cal.), 8 (Jarvis Jay Masters, Cal.), 11 (Walter Ogrod, Pa.), 14 (Tyrone Lee Noling, Ohio), 16 (Eddie Lee Howard Jr., Miss.), 18 (Rodney Reed, Tex.), 19 (Darlie Lynn Routier, Tex.), 21 (Marcellus S. Willams, Mo.), 22 (Larry Ray Swearingen, Tex.), 24 (Robert Leslie Roberson III, Tex.). The chance that Cooper and Masters will be executed decreased on March 13, 2019, when California Governor Gavin Newsom declared a moratorium on executions. *A Pause for California's Death Row* (editorial), N.Y. TIMES, Mar. 14, 2019, at A24.

[14] *Infra* profile Nos. 9 (Ralph International Thomas, Cal.), 12 (Anibal Garcia Rousseau, Tex.), 13 (Dennis Harold Lawley, Cal.).

[15] *Infra* profile Nos. 5 (John George Spirko Jr., Ohio), 7 (Karl Allen Fontenot & Thomas Jesse Ward), 15 (David Ronald Chandler, Ala. (federal)), 23 (Kimber Edwards, Mo.).

[16] *Infra* profile Nos. 1 (Sonia Jacobs, Fla.), 4 (Edward Lee Elmore, S.C.), 10 (Ha'im Al Matin Sharif, Nev.), 17 (Damien Wayne Echols, Ark.), 20 (Corey Dewayne Williams, La.). To avoid remaining behind bars pending court-ordered retrials, four of these defendants—all except Williams—pleaded guilty while professing innocence, as authorized under the Supreme Court's decision in *North Carolina v. Alford*, 400 U.S. 25, 28 n.2 (1970) (affirming acceptance of a plea from Henry C. Alford, who had told the trial court "I'm not guilty but I plead guilty"). While a petition for certiorari for Williams was pending before the U.S. Supreme Court, the prosecution and defense filed a joint motion in the trial court to vacate his conviction, with the understanding that he would plead guilty to lesser charges in exchange for immediate freedom. The trial judge granted the motion and Williams was released. *See infra* notes 809–11 and accompanying text.

[17] Jacobs v. State, 396 So. 2d 713, 715 (Fla. 1981) (per curiam).

[18] *Id.*

[19] Mike Clary, *Judge M.D. Futch, 'Maximum Dan'*, SUN SENTINEL (Apr. 14, 2009), http://www.sun-sentinel.com/news/fl-xpm-2009-04-14-0904130494-story.html.

[20] *Jacobs*, 396 So. 2d at 715. In Florida, notwithstanding a jury recommendation of a life sentence, a trial judge may impose a death sentence. FLA. STAT. § 921.141(3) (2017).

sentenced Jesse Joseph Tafero, father of the younger of Jacobs's children,[21] to death for the same crime.[22]

Jacobs, her children, Tafero, and Walter Norman Rhodes, Jr. had been asleep in a Chevrolet Camero at the rest stop when Black and Irwin approached the car and, within minutes, were shot to death.[23] Rhodes would attribute the murders to Jacobs and Tafero.[24] Jacobs claimed that she did not see what happened and denied firing any shots.[25] Tafero said that Rhodes killed the officers.[26] Two truck drivers who saw the murders could not discern who fired the shots, although they did see Rhodes standing in front of the car, and one of the truckers thought the initial shots came from the back seat—which, if correct, would indicate that Jacobs had fired them.[27] However, gunshot residue on Rhodes's hands indicated that he probably had fired all of the shots.[28]

Despite the conflicting evidence, the prosecution made a deal with Rhodes under which he would plead guilty to second-degree murder and receive a life sentence in exchange for testifying against Jacobs and Tafero.[29] At both trials, Rhodes testified that the officers ordered him out of the car and, while his back was to the car and his hands were raised, he heard a shot, turned and saw Jacobs, in the rear seat, holding a nine-millimeter handgun,[30] which Tafero took from her and with which he shot the officers.[31] At the Jacobs trial, her former cellmate, Brenda Isham, testified that Jacobs had admitted shooting the officers.[32] The prosecution also introduced several ostensibly incriminating statements police attributed to Jacobs—including allegedly answering, "We had to," when asked, "Do you like shooting troopers?"[33]

While Jacobs's appeal was pending, her counsel discovered that the lead prosecutor, Broward County Assistant State Attorney Michael J. Satz, had suppressed a memo saying that Rhodes had told a polygraph examiner that "he could not be sure

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[21] *Jacobs*, 396 So. 2d at 715 n.2.
[22] Tafero v. State, 403 So. 2d 355, 358–59 (Fla. 1981) (per curiam).
[23] *Jacobs*, 396 So. 2d at 715.
[24] *Id.* at 716.
[25] Email message from Christie E. Webb, appellate attorney for Jacobs, to Rob Warden. (Jan. 2, 2018, 19:08 CST PM) (on file with authors).
[26] *Jacobs*, 396 So. 2d at 716.
[27] Jacobs v. Singletary, 952 F.2d 1282, 1289 n.4 (11th Cir. 1992).
[28] *See* FLA. DEP'T OF CRIMINAL LAW ENFORCEMENT, GUNPOWDER RESIDUE/NEUTRON ACTIVATION ANALYSIS, REP. NO. 760250979, 1–2 (1976) (on file with authors) (reporting that residue on Rhodes's hands was "consistent with the subject having discharged a weapon," while residue on Jacobs's hands was indicative only of her "having handled an unclean or recently discharged weapon" and that residue on Tafero's hands was indicative of him "having handled an unclean or recently discharged weapon, or possibly discharging a weapon."). These findings are consistent with Tafero's claim that Rhodes handed him the gun after firing it. S*ee infra* note 40 and accompanying text.
[29] *Singletary*, 952 F.2d at 1285–88; Tafero v. Wainwright, 796 F.2d 1314, 1315–16 (11th Cir. 1986) (per curiam); *Jacobs*, 396 So. 2d at 715.
[30] *Jacobs*, 396 So. 2d at 715.
[31] *Id.*
[32] *Singletary*, 952 F.2d at 1286. A 2005 study by the Center on Wrongful Convictions found that testimony of witnesses with incentives to lie—"snitches," in the vernacular—had been instrumental in fifty-one of 111 capital cases (45.9%) in which the defendants had been exonerated after capital punishment was resumed in the 1970's. NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2005), https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf.
[33] *Jacobs*, 396 So. 2d at 717.

whether or not Jacobs had fired at all."[34] In light of the contradiction between the memo and Rhodes's trial testimony, the Florida Supreme Court put the appeal on hold, directing Judge Futch to determine whether suppression of the memo had violated Jacobs's rights.[35]

Citing other prior inconsistent statements by Rhodes that the prosecution had provided to the defense, Judge Futch held that, when Rhodes's trial testimony "was viewed in its entirety," withholding the memo had not been prejudicial.[36] In 1981, the Florida Supreme Court agreed, affirming Jacobs's conviction, but remanding her case for resentencing—holding that Futch had lacked sufficient basis to override the jury's recommendation of a life sentence.[37] Futch thereupon resentenced Jacobs to life.[38] Rhodes, meanwhile, had signed an affidavit recanting his trial testimony "in the interest of justice and to purge myself before my creator"[39] and stating that moments after getting out of the Camaro with a gun concealed under his shirt:

> I fired a shot into the left side of his chest. The bullet went through him and hit the chrome windshield molding of the patrol car. I fired four more shots through his head and various parts of his body . . . As I swiveled to the left, I observed Constable Irwin attempting to grap *[sic]* the service revolver from Patrolman Black's grip. Thus I fired twice through his head.[40]

The affidavit continued that Assistant State Attorney Satz had "coerced, threatened, and cajoled" him to falsely attribute the murders to Tafero and Jacobs.[41]

In 1982, after Tafero had lost his appeal to the Florida Supreme Court,[42] Rhodes stated in another affidavit that he had been "the triggerman" and that "neither Tafero nor [Jacobs] participated in the shooting and had no prior knowledge that such would occur."[43] Rhodes mailed the second affidavit to Satz[44] and, days later, in a sworn statement taken by an attorney for Tafero, again stated that he alone killed the officers.[45] Asked to explain why he had recanted his trial testimony, Rhodes replied:

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[34] Jacobs v. State, 357 So. 2d 169, 170 (Fla. 1978) (per curiam); *see also* Memorandum from Carl Lord, polygraph examiner, to Assistant State Attorney Michael J. Satz (Apr. 6, 1976) (on file with authors).
[35] *Jacobs*, 357 So. 2d at 171; *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment").
[36] *Jacobs*, 396 So. 2d at 716. Rhodes had not testified that he saw Jacobs fire a shot, but rather that he had heard a shot and then saw Jacobs hand the gun to Tafero. *Id.*
[37] *Id.* at 718.
[38] Brief for Appellant at 3, Jacobs v. Dugger, No. 90-5293 (11th Cir. 1990) (on file with authors).
[39] Affidavit of Walter Norman Rhodes at 1, (Nov. 9, 1979) (on file with authors).
[40] *Id.* at 2.
[41] *Id.* at 3.
[42] Tafero v. State, 403 So. 2d 355, 358 (Fla. 1981) (per curiam).
[43] Affidavit of Walter Norman Rhodes Jr., mailed to Broward County Assistant State Attorney Michael J. Satz (Sept. 6, 1982) (on file with authors).
[44] *Id.*
[45] Sworn Statement of Walter Norman Rhodes at 9, 14 (taken by Elizabeth J. Du Fresne, Union Corr. Inst., Sept. 24, 1982) (on file with authors).

> It's very simple. Ever since this thing happened, I felt extremely—I hate to use the word, but I felt extremely guilty. . . . I felt guilty afterwards, after coming to prison, and knowing that I put two people . . . on death row, for something they didn't do, and I did.[46]

Eventually, Rhodes recanted his recantations—claiming that they had been motivated variously by pressure from fellow prisoners, by promises of sex, and by substantial sums of money offered by a Tafero emissary[47]—but the Florida Supreme Court denied an evidentiary hearing Tafero sought regarding the recantations.[48] Tafero sought a federal writ of habeas corpus, which also was denied,[49] and, on May 4, 1990, he was executed—suffering a macabre death in "Old Sparky," as the Florida electric chair was known, convulsing as flames poured from his head.[50]

In Jacobs's case, Brenda Isham, who had testified at Jacobs's trial that she had confessed to her, recanted, claiming—reminiscent of Rhodes's recantations—that prosecutors had pressured her into lying.[51] Isham initially had told the authorities—contrary to her trial testimony—only that she had heard "jailhouse gossip" to the effect that Jacobs had confessed—but the initial statement had not been disclosed to the defense.[52]

As evidence of Jacobs's innocence mounted, Micki Dickoff, a Los Angeles filmmaker, initiated correspondence with her; the two had been inseparable friends in their pre-teens living near each other on Long Island, New York, in the 1950s.[53] After

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[46] *Id.* at 9. For a discussion of how courts and prosecutors often dismiss recantations as invalid, even though they often eventually prove valid, *see* Rob Warden, *Reflecting on Recantations*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 106 (Daniel S. Medwed ed., 2017) ("One lesson of the DNA forensic age is that recantations of trial testimony by prosecution witnesses deserve to be taken seriously, notwithstanding time-honored dicta to the contrary. Unfortunately, the lesson seems to have been lost on some prosecutors and judges.").

[47] Lane Kelley, *Threats, Bribes Changed Testimony, Inmate Says*, SUN-SENTINEL (Fort Lauderdale), Oct. 3, 1992, at 3B (quoting Rhodes as saying that he had recanted in light of "subtle pressure" from prisoners, leading him to fear for his life, and in light of a visit from a since-deceased female Tafero emissary who "was willing to do anything to get me to change my testimony").

[48] *See* Tafero v. State, 440 So. 2d 350 (Fla. 1983) (a 3–2 decision, in which the justices in the majority did not explain their rationale, while dissenting Justices Ben F. Overton and Joseph A. Boyd Jr. contended "that whenever the asserted recanted testimony was a critical feature of the trial there must be an evidentiary hearing"). In 1984, at a post-conviction hearing in Tafero's case, Rhodes recanted his recantation. *See* Brief for Appellant, *supra* note 38, at 30 n.28. In 1992, Rhodes would testify that he had falsely recanted his original testimony because he had been threatened by fellow prisoners and because a woman attorney, since deceased, had offered him money and sexual favors. Kelley, *supra* note 47.

[49] Tafero v. Wainwright, 796 F.2d 1314, 1322 (11th Cir. 1986) (per curiam).

[50] Barry Bearak, *Dispute over Fiery Death Idles Florida Electric Chair*, L.A. TIMES, July 23, 1990, at 15; Rene Stutzman, *Convicted Cop-Killer Executed*, UNITED PRESS INT'L, May 4, 1990, https://www.upi.com/Archives/1990/05/04/Convicted-cop-killer-executed/2009641793600/. Botched executions prompted Florida to abandon the electric chair in favor of lethal injection in 2000. Leslie Clark, *Lethal Injection Approved*, MIAMI HERALD, Feb. 17, 2000, at B1. For background on the Florida electric chair, see Sydney P. Freedberg, *The Story of Old Sparky*, ST. PETERSBURG TIMES, Sept. 25, 1999, at 6A.

[51] Brief of Appellant, *supra* note 38, at 2–3.

[52] *Id.* at 17–19.

[53] Peter Marks, *Inseparable Sunny Jacobs and Micki Dickoff Were Decades and Worlds Apart When Murder, a Death Sentence and the Essence of Friendship Brought Them Back Together*, NEWSDAY (Long Island), Sept. 8, 1992, at 44.

meeting with Jacobs and looking into the evidence, Dickoff became persuaded of her childhood friend's innocence—and of Tafero's as well.[54] Dickoff, with the help of her lawyer, Christie E. Webb, provided an analysis for a U.S. Court of Appeals brief attacking the last vestige of seemingly credible evidence against Jacobs—the truck drivers' testimony, which the prosecution had construed as corroboration of Rhodes's trial testimony.[55] Dickoff and Webb demonstrated that, when the shots were fired, the view of one of the truckers had been obstructed as the other trucker's rig passed between him and the murder scene, while the latter's view shifted from his right window to his rearview mirror.[56] Consequently, the truckers' trial testimony, contrary to the contention of the prosecution, had been consistent with the defense theory that Rhodes alone had shot the officers.[57]

In February 1992, the Court of Appeals reversed Jacobs's conviction and remanded her case for retrial, holding that the trial court had erred in admitting her alleged statements to police into evidence, and that the prosecution had improperly suppressed the polygraph examiner's exculpatory memo and Isham's initial statement that she merely had heard gossip to the effect that Jacobs had confessed.[58]

Jacobs sought release on bond, which was denied.[59] In October 1992, eight months after prevailing in the Court of Appeals, Jacobs—facing at least several months behind bars pending retrial, and perhaps reconviction, albeit unlikely—agreed to enter a plea without admitting guilt to two counts of second-degree murder under a procedure authorized by a U.S. Supreme Court decision in *North Carolina v. Alford*.[60] Upon her guilty-but-not-guilty plea, she was sentenced to time served and released.[61]

In 2011, at age sixty-four, Jacobs married seventy-three-year-old Peter Pringle, who had been sentenced to death in Ireland for the murder of two police officers in County Roscommon—a crime for which he had been exonerated in 1995 after fifteen years in prison.[62] They launched the Sunny Center, a not-for-profit organization that operates a sanctuary in Ireland for the wrongfully convicted.[63] But she remains legally

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[54] *Id.*
[55] Reply Brief of Appellant at 6–17, Jacobs v. Dugger, No. 90-5293 (11th Cir. 1990) (on file with authors).
[56] *Id.* at 5, 14–17.
[57] *Id.*
[58] Jacobs v. Singletary, 952 F.2d 1282, 1286, 1287–89, 1296 (11th Cir. 1992).
[59] Kelley Lane, *Convicted Killer Fights for Release*, SUN SENTINEL (Fort Lauderdale), July 20, 1992, at 1B.
[60] North Carolina v. Alford, 400 U.S. 25, 29–39 (1970); Peter Marks, *I'm Free, I'm Free, I'm Free! Serving Life in Murders, She's Released—with Friend's Aid*, NEWSDAY (Long Island), Oct. 13, 1992, at 5; *see also* IN THE BLINK OF AN EYE (ABC 1996), https://www.youtube.com/watch?v=VlpNI7cDEMk, a dramatization based on the Jacobs–Dickoff relationship that aired as an ABC "Movie of the Week" in 1996. For concise information on the advent of *Alford* pleas, see John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 171–73 (2014); *see also* Megan Rose & ProPublica, *The Deal Prosecutors Offer When They Have No Cards Left to Play*, ATLANTIC (Sept. 7, 2017), https://www.theatlantic.com/politics/archive/2017/09/what-does-an-innocent-man-have-to-do-to-go-free-plead-guilty/539001/.
[61] Marks, *supra* note 60.
[62] Vincent M. Mallozzi, *Sunny Jacobs and Peter Pringle*, N.Y. TIMES, Nov. 20, 2011, at ST15; Frances Mulraney, *'Death Row' Couple Helps Others*, IRISH VOICE (N.Y.), Jan. 4, 2017, at 7.
[63] Vincent M. Mallozzi, *Both Were Once on Death Row, Now They Share a Life Helping Others*, N.Y. TIMES, Jan. 23, 2019, at ST11; *see also* THE SUNNY CTR., http://www.thesunnycenter.com/.

guilty as a result of the plea that she entered in a context that amounts to a modern form of torture.[64]

2. Jonathan Bruce Reed—Texas

Wanda Jean Wadle, a twenty-six-year-old Braniff Airlines flight attendant, was fatally assaulted in her Dallas, Texas, apartment in the early afternoon of November 1, 1978.[65] Her roommate and fellow flight attendant, Kimberly Pursley, arrived during the attack and heard a man call out from the bedroom, "Don't come in here. Stay out there"—to which Pursley replied, "Don't worry, I won't come in."[66]

When the man emerged from the bedroom, he said he was from maintenance and was there to check the air-conditioning filter, but he then bound and gagged Pursley until she feigned unconsciousness, whereupon he left, robbing her of twenty dollars.[67] After freeing herself, Pursley ran outside, encountering a neighbor a nurse, who with her roommate nurse, went into the apartment and found Wadle on her bedroom floor, nude from the waist down, blood oozing from her mouth, a plastic bag and belt around her neck, and her hands bound with a telephone cord.[68] Pursley summoned emergency personnel, who found Wadle still breathing and rushed her to a hospital, where she died nine days later.[69]

Pursley described the attacker as white, twenty-five to twenty-eight years old, with medium-length, curly, thinning blond hair, a little more than six feet tall, and weighing about 180 pounds.[70] After reading a newspaper account of the attack, Micki Green, a legal secretary who lived in the same apartment complex, reported that a man with wavy blond hair had knocked on her door the afternoon of the attack, identified himself as a maintenance man, and asked if anyone had been by to check her air filter.[71] Green told the man that she did not know if anyone had been there because she had not been home, whereupon the man left, telling her that he would return to check the filter.[72]

From the descriptions provided by Green and Pursley, an artist prepared a composite sketch, which was pinned to the visor of a squad car into which twenty-four-year-old Jonathan Bruce Reed happened to be placed a few weeks later when he was

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[64] *See* Toni Schlesinger, *Plea Bargaining Is Torture*, CHI. LAW., Dec. 1978, at 1 (quoting University of Chicago Law Professor John H. Langbein on "the parallels in function between torture and plea bargaining").
[65] Reed v. Dretke, No. 3:99-CV-0207-N, 2005 U.S. Dist. LEXIS 15019, at *3, *6 (N.D. Tex. July 27, 2005), *rev'd sub nom* Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009); SW. INST. OF FORENSIC SCI., AUTOPSY REPORT, CASE NO. 2663-78-1241 (1978) (on file with authors). Wadle was born September 17, 1952. *Wanda Jean Wadle*, FIND A GRAVE (Oct. 11, 2008), https://www.findagrave.com/memorial/30504443/wanda-jean-wadle (last visited May 23, 2019).
[66] *Quarterman*, 555 F.3d at 365; *Dretke*, 2005 U.S. Dist. LEXIS 15019, at *3.
[67] *Dretke*, 2005 U.S. Dist. LEXIS 15019, at *4–5.
[68] *Id.* at *5; *see also* State's Brief at 6–7, Reed v. Texas, No. 05-11-01495-CR (Tex. App. 2013).
[69] State's Brief, *supra* note 68, at 9.
[70] Appellant's Opening Brief at *18, Reed v. Texas, No. F81-01988-K (Tex. App. 2012).
[71] *Id.* at *8–9.
[72] *Id.* at *8.

arrested in connection with an unrelated sexual assault.[73] Noticing that Reed resembled the man depicted in the sketch, the arresting officer exclaimed, "Hey, that's you."[74] Within hours, Reed was identified in police lineups by Green, Pursley, and Green's neighbor Phil Hardin, who had seen a man with a clipboard in the area around the time of the crime.[75] Based on the identifications, Reed was arrested for Wadle's murder.[76]

No physical evidence linked him to the crime.[77] In fact, he was excluded as the source of fingerprints on items that Pursley believed the killer had touched—two drinking glasses, a cold-water tap, a telephone, and the front door knob.[78] Reed also had what seemed to be a well-corroborated alibi: His father would testify that at midday on the day of the attack, he called Reed at his part-time job at Diamond Motors—an eighteen-minute drive from the crime scene—and arranged for him to drive a family friend to Fort Worth. Reed agreed and left promptly for his parents' home, where he arrived shortly after 1:00 P.M., having stopped to buy gasoline, for which he had a credit card receipt.[79] A young woman visiting next door fixed the time of his arrival by the airing of a television show.[80] Later, from Fort Worth, Reed made two long-distance telephone calls, documented by receipts, to Diamond Motors, his part-time place of employment.[81]

Despite the fingerprint exclusion and alibi, the jury convicted Reed solely on the testimony of Pursley, Green, and Hardin.[82] The trial judge ordered a new trial for an unspecified reason,[83] but Reed again was convicted and sentenced to death in 1983 after his second jury trial at which, in addition to the eyewitnesses, the prosecution called William S. McLean, Jr., Reed's former cellmate, who testified that Reed had confessed to the crime.[84] The prosecution told the jury that Reed confided details of the crime that only the killer would know—including that Wadle had a tampon in place during the

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[73] *Id.* at *10, *34–36; *see also* State's Brief, *supra* note 68, at *11. Reed was born on October 19, 1951. *Death Row Information: Offenders on Death Row*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html (last updated Mar. 1, 2019). The National Registry of Exonerations summarizes seven murder cases in which false convictions occurred after the advent of DNA technology in 1989. The cases are those of Kirk Bloodsworth (Md.), Jeffrey Cox (Va.), Cory Epps (N.Y.), Andre Haygood (Tex.) Anthony Hinton (Ala.), Frank Lee Smith (Fla.), and Paul Terry (Ill.) NAT'L REGISTRY OF EXONERATIONS, *supra* note 4.

[74] State's Brief, *supra* note 68, at *11.

[75] *Id.* at *10, *12

[76] *Id.* at *12.

[77] Appellant's Opening Brief, *supra* note 70, at *39, *75, *77.

[78] *Id.* at 75; *see also* FORENSIC SCIENCE ASSOCIATES REPORT 3 (2011) (on file with authors). The source of the prints might have been identified years later when the national Automated Fingerprint Identification System became available, but the state had lost the original fingerprint cards. Appellant's Opening Brief, *supra* note 70, at *7 n.8.

[79] Appellant's Opening Brief, *supra* note 70, at *3.

[80] *Id.* at *5–6.

[81] *Id.* at *4.

[82] Reed v. Quarterman, 555 F.3d 364, 366–67 (5th Cir. 2009). Micki Flanagan Green is referred to in some documents as "Green" and in others as "Flanagan."

[83] State *ex rel.* Watkins v. Creuzot, 352 S.W.3d 493, 495 (Tex. Crim. App. 2011). Although the reason for granting the new trial was not stated, it appeared that jury selection had violated *Adams v. Texas*, 448 U.S. 38 (1980), in which the Supreme Court addressed the application of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), to Texas's death-penalty statute. Email message from Robert C. Owen, appellate attorney for Reed, to Rob Warden. (Feb. 23, 2018, 18:16 CST) [hereinafter Owen E-mail] (on file with authors).

[84] Petitioner-Appellant's Supplemental Brief at 12, 27–28, Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009) (No. 05-70046).

attack.[85] In fact, the tampon had been inserted days later when Wadle began menstruating at the hospital.[86] Although prosecutors denied that McLean had been promised anything in exchange for his testimony, McLean would complain to them in writing that "you have brockin [sic] your ple [sic] bargin [sic] with me."[87]

In 2009, after protracted federal habeas corpus proceedings, the U.S. Court of Appeals for the Fifth Circuit awarded Reed a third trial, holding that there had been racial discrimination in selection of the jury for his second trial.[88] The Fifth Circuit, however, did not reach other issues, such as McLean's false testimony, who fed McLean the false information about the tampon, and whether McLean had been promised anything in return for helping send Reed back to death row.[89]

At the ensuing trial, the prosecution presented testimony of the victim of the sexual assault for which Reed had been arrested the month after the Wadle attack and of a self-professed accomplice in a burglary in which Reed allegedly pretended to be checking an air filter.[90] Reed was convicted for the third time in 2011[91]—by which time DNA testing had excluded him as the source of trace amounts of seminal material recovered from her pubic area.[92] This time, the prosecution did not seek the death penalty and Reed was sentenced to life in prison.[93]

After the third conviction was affirmed on direct appeal,[94] post-conviction proceedings were held in abeyance pending possible further DNA testing[95]—which, thanks to a recent advance in amplification technology, could make it possible to identify someone other than Reed as Wadle's killer.[96] Failing that, Reed in all likelihood will remain in prison for life, despite his exclusion as the source both of fingerprints on the

[85] *Id.* at 28.
[86] *Id.* at 28–29.
[87] *Id.* at 9, 24–27.
[88] *Quarterman*, 555 F.3d at 365. Of more than 2,200 documented state and federal false convictions since 1989, approximately 7% involved jailhouse-informant testimony. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 4.
[89] State *ex rel.* Watkins v. Creuzot, 352 S.W.3d 493, 495 (Tex. Crim. App. 2011). Not reaching these additional issues was in accord with the so-called "narrowest grounds" rule. *See* Ryan C. Williams, *Questioning Marks: Plurality Decisions & Precedential Constraint*, 69 STAN. L. REV. 795, 804 (2017).
[90] Reed v. State, No. 05-11-01495-CR, 2013 Tex. App. LEXIS 10489, at *2–3 (Tex. App. Aug. 20, 2013); Owen E-mail, *supra* note 83.
[91] *Reed*, 2013 Tex. App. LEXIS 10489, at *1.
[92] Appellant's Opening Brief, *supra* note 70, at *6, 7 n.9. The seminal material apparently resulted not from ejaculation but rather had been transferred from the attacker's groin. While the sample was sufficient to exclude Reed, it was insufficient to submit to the Combined DNA Index System (CODIS) to identify its possible source. E-mail from Edward T. Blake, forensic analyst for Reed, to author (Apr. 19, 2018, 15:44 CDT) [hereinafter Blake E-mail] (on file with authors).
[93] *Reed*, 2013 Tex. App. LEXIS 10489, at *1.
[94] *Id.* at *14; *see also Ex parte* Reed, No. WR-38,174-03, 2016 Tex. Crim. App. Unpub LEXIS 694, at *1 (July 27, 2016); *In re* Reed, No. PD-1663-13, 2014 Tex. Crim. App. LEXIS 222, at *1 (Feb. 12, 2014).
[95] *Reed*, 2016 Tex. Crim. App. Unpub LEXIS 694, at *1.
[96] Blake E-mail, *supra* note 92. For an overview of the amplification technology, known as MiniFiler, *see AmpFLSTR MiniFiler PCR Amplification Kit*, THERMOFISHER, https://www.thermofisher.com/us/en/home/industrial/human-identification/ampflstr-minifiler-pcr-amplification-kit.html (last visited May 23, 2019).

items recovered at the crime scene and seminal material recovered from the victim, and his corroborated alibi for the time of the crime.[97]

3. Robert M. Kubat—Illinois

On the morning of November 2, 1979, sixty-three-year-old Lydia C. Hyde was abducted from a tavern where she worked near Kenosha, Wisconsin, brought across the state line into Lake County, Illinois, and shot to death on the shoulder of U.S. Route 41 about a mile south of the Wisconsin state line.[98] On June 19, 1980, Robert M. Kubat, a forty-five-year-old truck driver from Lyons, Illinois, was sentenced to death for the crime.[99]

The principal witness against Kubat was his former wife, Carolyn Sue Quick, who surrendered to law enforcement officials in South Bend, Indiana, three weeks after the crime and portrayed herself as Kubat's unwilling accomplice.[100] Quick, then forty-one, was charged with aggravated kidnapping, but the charge was dropped in exchange for her testimony against her ex-husband.[101]

The defense portrayed Quick as a jealous and vindictive woman—she admitted on the witness stand that she once had threatened to kill Kubat[102]—and contended that Kubat had spent the night of November 1 and all of November 2, 1979, in the Chicago area with his girlfriend, Francine Bejda.[103] Kubat and Bejda had picked up a rent-assistance check on November 2 and cashed it that afternoon at a Chicago tavern, according to the defense.[104] The check, dated November 2, was entered into evidence, but the defense failed to rule out the possibility raised by the prosecution that it could have been cashed later.[105]

Three witnesses from one of the Kenosha area bars that Quick testified she and Kubat had visited before abducting Hyde identified him in court as the man who had been with her, although the identifications were tainted because they initially were made from a photographic spread in which Kubat's photograph was distinctive.[106] Two witnesses from the bar where the abduction occurred, but who had not seen the abduction itself, described the getaway vehicle not as the white Chevrolet station wagon that Quick claimed had been used in the crime, but as a gray Chevrolet Monte Carlo.[107]

The only physical evidence purporting to link Kubat to the crime was hair recovered from the front seat of his station wagon that a state forensic scientist testified

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[97] Appellant's Reply Brief at 6, Reed v. State, No. 05-11-01495-CR (Tex. App. Mar. 11, 2013) (on file with authors).
[98] Lynn Emmerman, *Waitress Seized, Slain in Robbery*, CHI. TRIB., Nov. 3, 1979, at 7.
[99] *Lyons Man Is Sentenced to Die in Waitress' Slaying*, CHI. TRIB., June 20, 1980, at D6 [hereinafter *Lyons Man*].
[100] People v. Kubat, 447 N.E.2d 247, 256–57 (Ill. 1983).
[101] *Id.* at 250.
[102] *Id.* at 252–53.
[103] *Id.* at 257.
[104] *Id.* at 258.
[105] *Id.* at 258–59.
[106] *Id.* at 253–54 (describing testimony of Jesse Lopez, Sandra Lawson, and Nora Lopez). The photographic spread consisted of five photographs, four of which were close-ups of individuals against a wall, while the fifth—the one of Kubat—was a full-frontal view with a television set, a painting, and furniture in the background. *Id.* at 279.
[107] *Id.* at 254; *see also* People v. Kubat, 501 N.E.2d 111, 116 (Ill. 1986).

was "consistent" with Hyde's hair.[108] Tires on Kubat's station wagon at the time of his arrest did not match a tire print found near Hyde's body, but the prosecution presented evidence that Kubat had purchased five new tires eight days after the crime, ostensibly to avoid detection.[109]

After convicting Kubat of murder and aggravated kidnapping, the jury found no mitigating evidence sufficient to preclude imposition of the death penalty[110]—not surprising, given that Kubat's lawyer, Lake County Public Defender George Pease, had presented no mitigating evidence.[111] Lake County Circuit Court Judge Robert K. McQueen sentenced Kubat to death, plus thirty years for the kidnapping.[112]

On direct appeal, Kubat's leading contention was that he had not been proved guilty beyond a reasonable doubt because Quick's testimony lacked the "absolute conviction of truth" because it had been conditioned on the dismissal of the kidnapping charge against her.[113] He also contended that Pease had failed to investigate exculpatory evidence and that the identification procedures had been "impermissibly suggestive and conductive to misidentification."[114]

After the Illinois Supreme Court affirmed the conviction and death sentence in January 1983—holding that the evidence "overwhelmingly" supported the jury's verdict[115]—*Chicago Lawyer*[116] published an extensive article undermining the moorings of the prosecution case, beginning with the claim that Kubat had gotten rid of the tires on his station wagon so that they could not be matched to the track at the crime scene.[117]

In a telephone interview from death row, Kubat said that he had replaced his old tires because they had been slashed and that he had taken the damaged ones to an Allstate Insurance Company claim center in Westchester, Illinois.[118] *Chicago Lawyer* obtained Allstate records—which George Pease had failed to obtain—establishing that the slashed tires were Uniroyals—standard equipment on a 1977 Chevrolet station wagon.[119] A

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[108] *Kubat*, 447 N.E.2d at 258. The forensic scientist was Michael Podlecki, who had testified in an earlier capital case that he had been unable "to find any dissimilarities" between a rape-murder victim's hair and hairs recovered from a car allegedly used by the defendants in her abduction. *See* People v. Rainge, 445 N.E.2d 535, 540 (Ill. 1983). Podlecki's testimony in that case proved to have been falsely incriminating when the defendants in the case were exonerated by DNA. Steve Mills & Ken Armstrong, *Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, at 1.

[109] *Kubat*, 447 N.E.2d at 252; *see also* Kubat v. Thieret, 867 F.2d 351, 363 (7th Cir. 1989).

[110] *Kubat*, 447 N.E.2d at 250.

[111] *Id.* at 269.

[112] *Lyons Man*, *supra* note 99.

[113] *Kubat*, 447 N.E.2d at 259–60.

[114] *Id.* at 261–64.

[115] *Id.* at 259, 278.

[116] A monthly investigative journal founded in 1978 by the Chicago Council of Lawyers—a small, liberal bar association founded eleven years earlier "in reaction to the failures of the established Chicago bar to speak out" regarding, among other issues, police violence surrounding the 1968 Democratic Convention and the ensuing "Conspiracy 7" trial. *See, e.g.*, John R. Schmidt, *Personal Appreciation of the Council*, CHI. LAW., May 1984, at B3. In 1988, ownership of *Chicago Lawyer* was transferred to Rob Warden, its longtime editor, who continued as editor until selling the publication to the Law Bulletin Publishing Company in 1989. Neil Tesser, Chicago Lawyer*: New Management, Less Muck*, CHI. READER, Sept. 15, 1989, at 4.

[117] Rob Warden, *Quick and the Dead: New Evidence Raises Doubt About the Guilt of the Man Carolyn Sue Quick Sent to Death Row*, CHI. LAW., Dec. 1983, at 1.

[118] *Id.* at 6.

[119] *Id.* at 6–7.

forensic analysis by Peter McDonald, manager of tire design for Firestone Tire & Rubber Company in Akron, Ohio, determined with "absolute certainty" that the tire print had not been left by a Uniroyal tire.[120]

Chicago Lawyer also reported that Pease had failed to interview or present potential witnesses who could have corroborated Kubat's alibi and, although it would not become an issue, that Pease had failed to investigate the possibility that—according to two Kenosha County Sheriff's Department reports—Hyde's body had been dumped beside Route 41 after she was killed elsewhere.[121] The new evidence regarding the tires—including a prosecution stipulation that the print could not have been left by a Uniroyal—and Pease's failure to corroborate Kubat's alibi were raised in a petition for post-conviction relief, but was rejected by Lake County Circuit Court Judge Fred A. Geiger.[122] The Illinois Supreme Court affirmed Geiger, but Justice Seymour Simon strongly dissented, writing:

> Counsel's performance was patently deficient, and there is a reasonable probability that the defendant would have been acquitted had his alibi defense been properly developed and Quick impeached with all the evidence at hand. . . . Justice does not permit the execution of a defendant who was effectively rendered no legal assistance at all, and I must emphatically dissent.[123]

Kubat next turned to the federal courts, seeking a writ of habeas corpus, focusing on ineffective assistance of counsel.[124] U.S. District Court Judge Nicholas J. Bua—although stating that "the seeds of ineffectiveness had been sown before the trial even commenced"[125]—affirmed Kubat's conviction,[126] but vacated his death sentence, holding that Pease had failed during the sentencing phase of the trial to call witnesses whose "testimony would have made an impressive case for sparing Kubat's life."[127] After the U.S. Court of Appeals for the Seventh Circuit affirmed Bua's decision,[128] Kubat remained in prison another two decades, until finally being paroled in 2009.[129] He died four years later.[130] The Illinois death penalty was abolished in 2011.[131]

4. Edward Lee Elmore—South Carolina

On January 18, 1982, Jimmy Holloway, a member of the Greenwood, South Carolina, County Council, reported finding the body of his neighbor, Dorothy Edwards, a

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[120] *Id.* at 7.
[121] *Id.*
[122] People v. Kubat, 501 N.E.2d 111, 118 (Ill. 1986).
[123] *Id.* at 122–23 (Simon, J., dissenting).
[124] U.S. *ex rel.* Kubat, 679 F. Supp. 788, 810 (N.D. Ill. 1988).
[125] *Id.* at 809.
[126] *Id.* at 810.
[127] *Id.*
[128] Kubat v. Thieret, 867 F.2d 351, 374 (7th Cir. 1989).
[129] E-mail from Dolores Kennedy, who investigated the *Kubat* case, to Rob Warden (Dec. 21, 2017, 14:15 CST) (on file with authors).
[130] LaSalle Cty. Clerk, Medical Certificate of Death for Robert Kubat (2013) (on file with authors).
[131] John Schwartz & Emma Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 9, 2011, at A18.

seventy-five-year-old widow, in her bedroom closet.[132] Holloway told police that, when he had seen Edwards two days earlier, she had mentioned that she planned to go out of town.[133] Thus, after noticing her car parked near her home on January 18, he knocked on her backdoor—which came open, revealing signs of a disturbance and prompting him to go inside.[134] She had been "savagely attacked and brutally raped."[135]

Although Holloway was a logical suspect,[136] rather than investigating him, the authorities focused on a suspect he brought to their attention—Edward Lee Elmore, a twenty-three-year-old African American handyman with an IQ of about seventy.[137] Edwards, who was white, had employed Elmore sporadically to wash the windows and clean the gutters of her home.[138] Her checkbook showed that she had paid him by check, most recently on December 30, 1981.[139] The day after Holloway reported the crime, police found Elmore's thumbprint on the outside frame of Edwards's backdoor and arrested him the next morning.[140]

Elmore's trial began on April 12, 1982, before Judge E.C. Burnett III and a jury with ten white and two African American members.[141] The prosecutor was William T. Jones III, who for thirty years had been Greenwood County's elected solicitor, the official title of South Carolina prosecutors.[142] Elmore's lead defense lawyer was a hard-drinking local public defender, Geddes D. Anderson, who would deny an investigator's allegation that he had been "drunk through the whole trial," but would acknowledge that he believed "the son-of-a-bitch [Elmore] did it."[143] Anderson was assisted by a court-appointed Greenwood lawyer, John Beasley, who once allegedly referred to Elmore as a "redheaded nigger."[144]

Jones's case relied heavily on Dr. Sandra Conradi, a forensic pathologist who performed the Edwards autopsy.[145] Conradi testified that Edwards's death could have occurred as late as Monday, January 18, but more likely had occurred on Saturday night, January 16—a time for which Elmore had no alibi.[146] Edwards had been stabbed repeatedly in the head, neck, and chest, suffering more than seventy separate injuries, including defensive wounds to her arms and hands, fractured ribs, and vaginal abrasions that, according to Conradi, were indicative of sexual assault.[147]

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[132] Elmore v. Ozmint, 661 F.3d 783, 785–87, 807 (4th Cir. 2011).
[133] *Id.* at 791–92.
[134] *Id.*
[135] State v. Elmore, 332 S.E.2d 762, 765 (S.C. 1985), *vacated by* Elmore v. South Carolina, 476 U.S. 1101 (1986).
[136] *Ozmint*, 661 F.3d at 803 (Holloway's "illogical statements and bizarre conduct . . . rendered him the probable murderer."); *see also* CONNIE FLETCHER, WHAT COPS KNOW 70 (1990) (quoting a Chicago detective as saying, "Many times the person who discovers the body is the killer.").
[137] *Ozmint*, 661 F.3d 803 at 785–87, 807.
[138] *Id.* at 787, 807.
[139] *Id.* at 787.
[140] *Id.*
[141] RAYMOND BONNER, ANATOMY OF INJUSTICE: A MURDER CASE GONE WRONG 43–44, 54 (2013).
[142] *Id.* at 41.
[143] *Id.* at 46–47.
[144] *Id.* at 48; *see also Ozmint*, 661 F.3d 803 at 826 n.23.
[145] BONNER, *supra* note 141, at 59.
[146] *Id.* at 61–62.
[147] *Id.* at 59–61.

The theory that Edwards had been raped was supported by state forensic chemist Earl Wells, who testified that he had determined to "a very high degree of probability" that Elmore was the source of pubic hairs that police claimed to have recovered from Edwards's bed.[148] John C. Barron, a state forensic serologist, testified that spots of Type A blood—Edwards's type, shared by forty to forty-five percent of the population—had been found on a pair of blue jeans found in Elmore's room.[149] Sergeant Alvin Johnson and Lieutenant Thomas W. Henderson, Jr., of the state police, testified that Elmore told them that if he had killed Edwards he could not remember it.[150] James Gilliam, a jailhouse informant, testified that Elmore had spontaneously confessed that he went to Edwards's house to rob her, but killed her because "she wouldn't quit screaming."[151] Gilliam added that Elmore said he knew that "the police couldn't have no fingerprints of his because he had wiped everything down when he left."[152] Elmore took the stand to deny the statements attributed to him by the state police officers and Gilliam.[153]

After deliberating two and a half hours, the jury found Elmore guilty of murder, criminal sexual conduct, house-breaking, and burglary.[154] Two days later, while the jury was deliberating Elmore's punishment, Judge Burnett, unaccompanied by counsel, went into the jury room and asked the status of the deliberations.[155] Shortly thereafter, the jury recommended a death sentence.[156] When Burnett asked if Elmore wished to say anything, he responded, "I'd like to say I did not commit that crime Your Honor said I did."[157] Burnett followed the jury's recommendation—sentencing Elmore to death in the electric chair.[158]

In 1983, the South Carolina Supreme Court reversed the conviction and remanded the case for a new trial, holding that Burnett's visit with the jury had been "highly improper" and in violation of Elmore's right to be present at all stages of his trial.[159] Elmore was tried again in 1984, this time before a jury of eight white jurors, four African American jurors, and a different judge, James E. Moore, but with the same prosecutor and defense counsel, although Elmore requested different lawyers.[160] The evidence was virtually the same as at the first trial, and, as at the first trial, the jury deliberated for two and a half hours before finding Elmore guilty.[161] The second jury, like the first, recommended a death sentence, and Judge Moore obliged.[162]

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[148] *Id.* at 67–69.
[149] *Id.* at 56–57; *see also Ozmint*, 661 F.3d at 786.
[150] BONNER, *supra* note 141, at 77–78.
[151] *Id.* at 70, 72.
[152] *Id.* at 71–72.
[153] *Id.* at 77; *see also Ozmint*, 661 F.3d at 837.
[154] BONNER, *supra* note 141, at 82–83.
[155] State v. Elmore, 308 S.E.2d 781, 785 (S.C. 1983) (per curiam), *overruled by* State v. Torrence, 406 S.E.2d 315 (S.C. 1991).
[156] BONNER, *supra* note 141, at 92–94.
[157] *Id.* at 94.
[158] *Id.*
[159] *Elmore*, 308 S.E.2d at 784–85.
[160] BONNER, *supra* note 141, at 98–100.
[161] *Id.* at 100. Although Cooper remains on death row, the chance that he will be executed was diminished when Governor Newsom declared a moratorium on executions on March 13, 2019. *See A Pause for California's Death Row*, *supra* note 13.
[162] BONNER, *supra* note 141, at 100.

In 1985, the South Carolina Supreme Court affirmed the conviction and sentence,[163] but the following year the U.S. Supreme Court remanded the case in light of its recent decision in another South Carolina capital case in which it held that a trial court's exclusion of certain mitigating evidence had deprived a jury of information relevant to sentencing.[164] On remand, Elmore received death sentence,[165] his third, which the South Carolina Supreme Court affirmed in 1989.[166]

Six years later, Diana Holt, who had been a lawyer for less than a hundred days and was working at the South Carolina Death Penalty Resource Center, entered the case, joining J. Christopher Jensen, a New York litigator who had taken the case pro bono.[167] In ensuing state post-conviction and federal habeas-corpus proceedings, Holt and Jensen raised issues that the U.S. Court of Appeals for the Fourth Circuit would conclude raised "grave questions about whether it really was Elmore who murdered Mrs. Edwards."[168]

Holt and Jensen contended that the pubic hairs and blood purportedly linking Elmore to the crime had been planted by police—inferences they drew from the facts that investigators had not photographed the hairs after supposedly discovering them, and that copious amounts of blood, not tiny spots, would have been on clothing worn by the killer during the crime.[169]

New evidence developed by Holt and Jensen established that the prosecution had falsely represented that a fingerprint found on Edwards's toilet had been unidentifiable, when in fact both she and Elmore had been eliminated as its source, and that the prosecution had suppressed the fact that a Caucasian hair from someone other than Edwards had been found on her body, indicating that the killer had been white—not African American.[170]

The previously secret evidence pointing to someone other than Elmore as the killer led Holt to suspect that the crime had been committed by Holloway, Edwards's now-deceased neighbor with whom it was rumored that Edwards had had an affair.[171] From an interview with Edwards's daughter, Carolyn Lee, who confided that her mother's planned trip probably had been to visit a man whom she planned to marry in North Carolina, Holt deduced that Holloway had a motive—jealousy.[172] Not long before his death in 1994, Holloway had told Holt that the police initially had questioned him because "neighbors probably told them [the police] me [sic] and Dorothy [Edwards] were [sic] having an affair."[173]

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[163] State v. Elmore, 332 S.E.2d 762, 765 (S.C. 1985), *vacated by* Elmore v. South Carolina, 476 U.S. 1101 (1986).
[164] Elmore v. South Carolina, 476 U.S. 1101 (1986). The underlying case to which the decision referred was *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).
[165] BONNER, *supra* note 141, at 109.
[166] State v. Elmore, 386 S.E.2d 769 (S.C. 1989).
[167] BONNER, *supra* note 141, at 113, 143.
[168] Elmore v. Ozmint, 661 F.3d 783, 786 (4th Cir. 2011).
[169] *Id.*
[170] *Id.* at 786, 803, 838. The suppression of the hair evidence appeared to violate the U.S. Supreme Court's 1963 *Brady v. Maryland* decision. 373 U.S. 83 (1963).
[171] BONNER, *supra* note 141, at 140–41. Holloway died in 1994. Raymond Bonner, *Old Evidence Resurfaces, Unsettling '82 Murder Case*, N.Y. TIMES, Dec. 12, 2000, at A18.
[172] BONNER, *supra* note 141, at 139–41.
[173] *Ozmint*, 661 F.3d at 804 n.13.

Holt's suspicion of Holloway was strengthened by a new forensic analysis by Dr. Jonathan Arden, New York City's acting first deputy medical examiner, indicating that the crime most likely had occurred on January 17 or 18, when Elmore had a corroborated alibi.[174] It was, in Arden's words, "extraordinarily unlikely and improbable really in the extreme" that it had occurred on January 16, when Elmore lacked a credible alibi.[175] Further discrediting the veracity of Elmore's convictions, James Gilliam, the jailhouse informant, recanted his trial testimony—saying at an evidentiary hearing that he had lied because a jail administrator had promised him, "You help me out on the Elmore thing, we'll look after you."[176]

Although state post-conviction relief was denied despite the new evidence, Elmore's death sentence was reduced to life in prison in 2010 on the ground that his limited mental capacity prohibited his execution.[177] U.S. District Court Judge David C. Norton proceeded to deny habeas relief, but the Fourth Circuit reversed and remanded the case for another retrial in 2011, holding that Elmore had been denied effective assistance of counsel.[178]

After the Fourth Circuit decision, the prosecution offered to release Elmore immediately if he would enter an *Alford* plea.[179] Rather than spending more time behind bars and facing a fourth jury, Elmore entered the plea on March 2, 2012, attaining freedom—but, in the eyes of the law, rendering himself forever guilty.[180] He died December 3, 2018.[181]

5. John George Spirko, Jr.—Ohio

Betty Jane Mottinger, the postmistress of Elgin, a town of ninety-six residents located twenty-two miles west of Lima, disappeared on August 9, 1982[182]—thirteen days after John George Spirko, Jr., a thirty-six-year-old career criminal, had been paroled from a life sentence for strangling a seventy-two-year-old woman to death in Kentucky.[183]

Shortly after Mottinger's skeletal remains were found wrapped in a paint-splattered tarpaulin in a field fifty miles from Elgin in October 1982, Spirko was charged with

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[174] *Id.* at 808–09.
[175] *Id.* at 820–21.
[176] *Id.*
[177] *Id.* at 786; *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that executing "mentally retarded" persons violates the Eighth Amendment prohibition of cruel and unusual punishment).
[178] *Ozmint*, 661 F.3d at 786; BONNER, *supra* note 141, at 272.
[179] North Carolina v. Alford, 400 U.S. 25, 29–39 (1970).
[180] Raymond Bonner, *When Innocence Isn't Enough*, N.Y. TIMES, Mar. 2, 2012, at SR8. For an analysis of why Elmore chose to enter the plea, see Rob Warden, *'Injustice' Serves Dramatic Story, Historic Truths*, CHI. TRIB. PRINTERS ROW J., Mar. 18, 2012, at 17.
[181] Aleks Gilbert, *'He's Really Freed Now': Friends Mourn Passing of Elmore*, AP (Dec. 15, 2018), https://www.apnews.com/ef3fc79ae25f4e539616a186db733801.
[182] State v. Spirko, No. 15-84-22, 1989 Ohio App. LEXIS 710, at *1–2 (Mar. 6, 1989); Bob Paynter, *A Cold-Blooded Liar*, PLAIN DEALER (Cleveland), Jan. 23, 2005, at A1. Spirko was born on June 13, 1946. *Offender Details: John Spirko*, OHIO DEP'T OF REHAB. & CORR., https://appgateway.drc.ohio.gov/OffenderSearch/Search/Details/A171433 (last visited May 23, 2019).
[183] Paynter, *supra* note 182. For details of Spirko's Kentucky conviction, *see* Special Meeting Minutes, Ohio Parole Auth. (Aug. 23, 2005) (on file with authors), and Spirko v. Commonwealth, 480 S.W.2d 169, 170–71 (Ky. 1972).

feloniously assaulting a woman in a bar near Toledo.[184] In what he would contend was an ill-conceived ploy to avoid returning to prison in Kentucky for life—a serious possibility for felonious assault in light of his parole status—Spirko claimed to know what had happened to Mottinger and promised to tell all in exchange for leniency.[185]

Investigators initially discounted Spirko's story because they had a strong suspect— Marion "Sonny" Baumgardner, who was on parole for robbing a postmistress seven years earlier in Dupont, thirty miles from Elgin.[186] But when Baumgardner was arrested in Texas and proved to have an unassailable alibi for the day Mottinger disappeared,[187] investigators began taking Spirko seriously—ultimately agreeing to a deal under which, in exchange for his cooperation, he would face no more than five years in prison for the assault near Toledo.[188] In addition, his girlfriend, also allegedly involved in the Toledo area incident, would not be prosecuted.[189]

In interviews with postal inspectors in late 1982 and early 1983,[190] Spirko provided shifting accounts of what he claimed to know of Mottinger's fate, ranging from merely attending a party where he learned details of the crime to being present when she was raped, beaten, and stabbed to death by a man he knew only as "Rooster."[191] Some of Spirko's claims flew in the face of known evidence—e.g., he described the victim as a "fat bitch," although she weighed only 104 pounds; he said that she wore a gold necklace and gold watch, although her family maintained that she wore neither; he claimed that she had been stabbed in the back, although she had been stabbed only in the chest.[192] Postal inspectors may not have been aware of it when they questioned Spirko, but years earlier, in a scheme to get out of jail in Michigan, he had embarrassed authorities with a false claim that he had first-hand knowledge of a series of rape-murders.[193]

There were no known witnesses to the Mottinger abduction, but two witnesses reported seeing a man and a brown two-tone sedan outside the Elgin Post Office around the time that she disappeared.[194] One of the witnesses, Opal Seibert, described the man as clean-shaven, with dark hair, wearing a long-sleeved blue shirt.[195] The other witness, Mark Lewis, said the man was slightly pot-bellied, weighing about 240 pounds, with sandy-brown or reddish hair, maybe having a light mustache, and wearing a green short-sleeved shirt with orange stripes.[196] Neither description fit Spirko, who was blond and

[184] Paynter, *supra* note 182.
[185] Paynter, *supra* note 182; *see also* Bob Paynter, *A Mysterious Murder Suspect Emerges, Then Disappears*, PLAIN DEALER (Cleveland), Jan. 24, 2005, at A1.
[186] Paynter, *supra* note 182; *see also Body of Missing Postmistress Found*, UNITED PRESS INT'L (Sept. 20, 1982), https://www.upi.com/Archives/1982/09/20/Body-of-missing-postmistress-found/8636401342400/ (mentioning search for Baumgardner).
[187] Paynter, *supra* note 182 (quoting *Toledo Blade* story from Oct. 29, 1982, reporting that Baumgardner had been cleared of any involvement in the Mottinger case).
[188] Paynter, *supra* note 182.
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] Bob Paynter, *Cop, Criminal Square Off in Jailhouse Duel*, PLAIN DEALER (Cleveland), Jan. 25, 2005, at A1.
[193] Paynter, *supra* note 182. For details of the "Ypsilanti Ripper murders," see TOBIN T. BUHK, TRUE CRIME: MICHIGAN: THE STATE'S MOST NOTORIOUS CRIMINAL CASES 91–106 (2011).
[194] Paynter, *supra* note 185.
[195] *Id.*
[196] *Id.*

weighed about 180 pounds.[197] But in a scrapbook Spirko had maintained, Paul Hartman, the lead postal inspector assigned to the case, noticed a photograph of Delaney Gibson, Jr., a former Spirko cellmate, who appeared to match the description Seibert had provided.[198] Soon thereafter in a final interview, Spirko told Hartman that Gibson had robbed, kidnapped, raped, and murdered Mottinger.[199]

In September 1983, Spirko and Gibson were indicted for aggravated murder and kidnapping,[200] but Gibson was a fugitive and would remain so until after Spirko was tried, convicted, and sentenced to death.[201] The prosecution's theory at the August 1984 trial was that Spirko and Gibson committed the crime together—a theory resting largely on testimony by Seibert that she was "one hundred percent sure" that Gibson was the cleanly shaven man she had seen outside the Elgin post office two years earlier[202] and testimony by Hartman, the postal inspector, that Spirko had admitted committing the crime with Gibson.[203]

The evidence against Spirko otherwise had been underwhelming—testimony by two informants, Andre Ruffin and Leon Connors, that Spirko, who had been a cellmate of each, had admitted the abduction and murder,[204] and testimony by Mark Lewis that he was "seventy percent certain" Spirko was the man he had seen outside the post office[205]—a dubious claim because Lewis initially had identified Marion Baumgardner as the man in question.[206]

The defense contended that the crime might have been committed by an eighteen-year-old local drug dealer, John Willier, who had worked in the summer of 1982 as a house-painter—a capacity in which he had access to tarpaulins like the paint-splattered one in which Mottinger's remains had been found.[207] Five witnesses had reported seeing Willier around the time of the crime driving a brown sedan like the one described by Seibert and Lewis.[208]

After Spirko's conviction and death sentence were affirmed on direct appeal,[209] his pro bono attorneys from the Washington, D.C., law firm of Shaw Pittman LLP[210] discovered evidence—known to the prosecution and allegedly improperly withheld prior

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[197] *Id.*
[198] *Id.* Gibson and two co-defendants had been convicted of rape and, like Spirko, sentenced to life in prison in Kentucky. Gibson v. Commonwealth, 417 S.W.2d 237, 238 (Ky. Ct. App. 1967).
[199] Paynter, *supra* note 192.
[200] State v. Spirko, No. 15-84-22, 1989 Ohio App. LEXIS 710, at *2 (Mar. 6, 1989); *see also* Spirko v. Mitchell, 368 F.3d 603, 604 (6th Cir. 2004).
[201] *Spirko*, 1989 Ohio App. LEXIS 710, at *2; *Mitchell*, 368 F.3d at 604–05.
[202] *Mitchell*, 368 F.3d at 616.
[203] State v. Spirko, 570 N.E.2d 229, 242, *opinion recalled by* 579 N.E.2d 715 (Ohio 1991).
[204] *Id.* at 241, 246–47.
[205] *Id.* at 256.
[206] *Id.* at 239 n.1.
[207] Paynter, *supra* note 192.
[208] Memorandum in Support of Jurisdiction of Petitioner-Appellant, John G. Spirko at *4–5, *7–9, *13–14, Ohio v. Spirko, 1998 WL 34277220 (Ohio 1998) (No. 98-1202). Called as a defense witness, Willier denied both having driven such a car and having committed the crime. *Id.* at *15 n.7.
[209] State v. Spirko, No. 15-84-22, 1989 Ohio App. LEXIS 710, at *1–2 (Mar. 6, 1989).
[210] In 2005, Shaw Pittman LLP merged with Pillsbury Winthrop LLP, forming one of the nation's twenty largest law firms, Pillsbury Winthrop Shaw Pittman LLP. Neil Irwin, *Shaw Pittman, West Coast Firm in Merger*, WASH. POST, Feb. 10, 2005, at E01.

to trial[211]—indicating that Delaney Gibson could not have been in Ohio at the time of Mottinger's abduction and, thus, could not have been the man Opal Seibert had seen in Elgin on August 9, 1982.[212]

The newly discovered evidence indicated that from June through October 1982, Gibson and his wife, Margie, had been working on a crew of tomato-pickers in North Carolina—an alibi corroborated by the leader of the crew, by friends who had visited the Gibsons only hours before the Mottinger abduction, by the friends' motel receipt, and, most dramatically, by photographs of Gibson, showing that at the time of the crime he was not clean-shaven, but had a full beard.[213] In addition, Spirko's former cellmates, Ruffin and Connors, recanted their trial testimony that Spirko had confessed,[214] and Hartman acknowledged that he had been aware before Spirko's trial that Gibson could not have been involved in the crime.[215]

In spite of the new evidence, the U.S. Court of Appeals for the Sixth Circuit denied Spirko's petition for a writ of habeas corpus.[216] Spirko's lawyers petitioned for certiorari,[217] and a former director of the FBI, two retired federal court of appeals judges, and a former U.S. attorney for the Northern District of Illinois filed an amicus brief asserting that Spirko had been wrongly convicted because the prosecution had suppressed exculpatory evidence,[218] but the U.S. Supreme Court declined to hear the case.[219] Questions about Spirko's guilt nonetheless were sufficiently troubling that he received seven gubernatorial stays of execution prior to 2008, when his sentence was commuted to life in prison without parole by Governor Ted Strickland, who said:

> I have concluded that the lack of physical evidence linking him to the murder, as well as the slim residual doubt about his responsibility for the murder that arises from careful scrutiny of the case record and revelations

[211] *See* Brady v. Maryland, 373 U.S. 83, 86–88 (1963) (holding that the prosecution's suppression of evidence favorable to an accused person who has requested such evidence violates due process where the evidence is material either to guilt or to punishment).
[212] Paynter, *supra* note 192.
[213] Memorandum in Support of Jurisdiction of Petitioner-Appellant, John G. Spirko, *supra* note 208, at *10 n.1, *12 n.4.
[214] Spirko v. Mitchell, 368 F.3d 603, 614–15 (6th Cir. 2004) (Gilman, J., dissenting).
[215] Petitioner John Spirko's Memorandum of Law in Support of His Motion for Relief from Judgment at 4, Spirko v. Bradshaw, 404 F. Supp. 2d 984 (N.D. Ohio 2005) (No. 3:95CV7209), 2005 WL 6063085, at *12.
[216] *Mitchell*, 368 F.3d at 614.
[217] Petition for Writ of Certiorari, Spirko v. Bradshaw, 544 U.S. 948 (2005) (No. 04-972).
[218] Brief for Amici Curiae the Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable William S. Sessions, and Thomas P. Sullivan, as Amici Curiae in Support of Petitioner at 3–4, Spirko v. Bradshaw, 544 U.S. 948 (2005) (No. 04-972) ("After reviewing this case, *Amici* are convinced that had the prosecution properly discharged its obligation under *Brady v. Maryland*, Mr. Spirko would have received a fundamentally different trial.") (internal citation omitted); *see also id.* at 2 n.2 (background of amici William S. Sessions, former FBI director, Hon. John J. Gibbons and Hon. Timothy K. Lewis, former judges of the U.S. Court of Appeals for the Third Circuit, and Hon. Thomas P. Sullivan, former U.S. Attorney for the Northern District of Illinois).
[219] Spirko v. Bradshaw, 544 U.S. 948 (2005).

> about the case over the past twenty years, makes the imposition of the death penalty inappropriate in this case.[220]

Spirko's lawyers vowed to continue to pursue his exoneration,[221] but there was nowhere to turn and he continues to languish behind bars more than eleven years after Strickland spared his life.[222]

6. Kevin Cooper—California

Kevin Cooper was sentenced to death on May 14, 1985, for a murder that occurred in Chino Hills on June 4, 1984— two days after he escaped from the minimum-security section of the nearby California Institution for Men.[223] The bodies of the victims—Douglas and Peggy Ryen, forty-one-year-old chiropractors and Arabian horse-breeders, their ten-year-old daughter Jessica, and an eleven-year-old houseguest, Christopher Hughes—were found in the Ryen home on the morning of June 5.[224] The Ryens' eight-year-old son Joshua suffered near-fatal injuries.[225] The family station wagon was missing.[226]

Analyses of the stomach contents of the deceased indicated that they had been killed the previous night, one to three hours after they had eaten.[227] In all, they had suffered some 140 wounds inflicted variously with what appeared to have been a knife, an ice pick, and an axe or a hatchet.[228] Two blood-stained T-shirts—one blue, one tan—and a hatchet covered with dried blood were found near the home.[229] Numerous hairs that could have been ripped from someone's head during a struggle were found clutched in Jessica Ryen's right hand.[230]

Joshua Ryen attributed the crime to three Mexican men, one of whom wore a "blue short-sleeved shirt."[231] Two witnesses who had been driving in the area the night of the crime reported seeing three white men in a station wagon resembling the missing one.[232] Other witnesses reported seeing three white strangers drinking at a bar near the Ryen home that night.[233] On June 7, the Santa Barbara County Sheriff's Department issued a bulletin identifying the suspected perpetrators as three "white or Mexican males."[234]

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[220] Laura A. Bischoff, *Strickland Spares the Life of a Death Row Inmate*, DAYTON DAILY NEWS, Jan. 10, 2008, at A1.
[221] *Id.*
[222] *Offender Details: John Spirko*, *supra* note 182.
[223] People v. Cooper, 809 P.2d 865, 875–76 (Cal. 1991); Glenn Burkins, *Chino Hills Killer Cooper Sentenced to Death*, L.A. TIMES, May 15, 1985, at B35.
[224] *Cooper*, 809 P.2d at 875–76; *Kevin Cooper Timeline of Events*, INLAND VALLEY DAILY BULL. (Rancho Cucamonga, Cal.), Apr. 25, 2016, at 37.
[225] *Cooper*, 809 P.2d at 875.
[226] *Id.* at 878.
[227] *Id.* at 876; *see also* J. PATRICK O'CONNOR, SCAPEGOAT: THE CHINO HILLS MURDERS AND THE FRAMING OF KEVIN COOPER 20, 159–63 (2012).
[228] *Cooper*, 809 P.2d at 875–76.
[229] *Id.* at 877; Petition for Executive Clemency at 47 (Feb. 17, 2016) (on file with authors).
[230] Petition for Executive Clemency, *supra* note 229, at 38-39.
[231] *Id.* at 43.
[232] *Id.* at 6.
[233] *Id.* at 43–45.
[234] *Id.* at 8 (reproduction of police bulletin).

Two days later, however, Sheriff Floyd Tidwell announced that there was just one suspect—who was neither white nor Mexican, but African American: twenty-five-year-old Kevin Cooper, for whom a warrant had been issued on charges of murder, attempted murder, and prison escape.[235] It seemed unlikely that the massacre had been the work of one man, much less that of the 155-pound Cooper, given that Douglas Ryen, an ex-Marine, stood six-two and kept a loaded rifle near his bed; Peggy Ryen also kept a loaded pistol in her bedside drawer.[236] Cooper, moreover, could not have been the source of the hairs found in Jessica Ryen's hand.[237] Nor did the discovery of two blood-stained T-shirts square with the lone-perpetrator theory.[238] After his June 2 escape, however, Cooper, whose criminal record began at age seven,[239] had broken into and spent two nights in an unoccupied home 126 yards from the Ryen home.[240] It would be alleged that the hatchet found shortly after discovery of the massacre had been come from the unoccupied home.[241]

The day that the sheriff announced that Cooper had been charged and was sought for committing the murders, a woman named Diana Roper contacted the sheriff's office to report her suspicion that the crime had been committed by her boyfriend—Eugene Leland Furrow, who was white and who until recently had been in prison for murder.[242] Roper said that early on the morning of June 5 Furrow had appeared at her home driving a station wagon and wearing blood-splattered coveralls, which she turned over to the sheriff's office.[243] She added that on June 4 she had laid out clothes for Furrow, including a tan T-shirt, which was gone.[244] After learning that a hatchet linked to the Ryen crime had been found, Roper again contacted the sheriff's office to report that she had checked Furrow's tool chest and discovered a hatchet missing.[245] Despite Roper's claims, however, Furrow would not be seriously pursued as a suspect and the bloody coveralls would be destroyed without being tested.[246]

Cooper remained the prime suspect even though, after seeing a photograph of him on television on June 14, Joshua Ryen spontaneously told his grandmother that Cooper had not committed the crime.[247] On July 30, Cooper was arrested near the Santa Barbara coast, where he had been working as a deckhand.[248] When he arrived at the San

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[235] *Kevin Cooper Timeline of Events*, *supra* note 224.
[236] Nicholas Kristof, *Framed for Murder?*, N.Y. TIMES, Dec. 8, 2010, at SR1.
[237] *Id.* (stating that the hairs were blond or brown); *see also* Petition for Executive Clemency, *supra* note 229, at 38 (citing a San Bernardino laboratory report stating that the hairs had not come from an African American).
[238] Petition for Executive Clemency, *supra* note 229, at 38 (citing a San Bernardino laboratory report stating that the hairs had not come from an African American).
[239] His convictions were for property-related offenses and escapes. He had been arrested for, but not convicted of, attempted rape and rape. O'CONNOR, *supra* note 227, at 77–80; *see also* FBI Record No. 759 916, Nat'l Crime Info. Ctr. (June 21, 1983) (on file with authors).
[240] O'CONNOR, *supra* note 227, at 57–67; *see also* People v. Cooper, 809 P.2d 865, 876 (Cal. 1991).
[241] *Cooper*, 809 P.2d at 877, 903.
[242] *Kristof*, *supra* note 236; *see also* People v. Allen, 729 P.2d 115, 120–21 (Cal. 1986, as modified Jan. 2, 1987) (describing Furrow's murder of 17-year-old Mary Sue Kitts in 1974).
[243] Petition for Executive Clemency, *supra* note 229, at 7, 48–49; O'CONNOR, *supra* note 227, at 47–53.
[244] O'CONNOR, *supra* note 227, at 48.
[245] *Id.*
[246] *Id.* at 51–53; *see also* Petition for Executive Clemency, *supra* note 229, at 7.
[247] Petition for Executive Clemency, *supra* note 229, at 84.
[248] *Kevin Cooper Timeline of Events*, *supra* note 224.

Bernardino County Jail in shackles the next night, he was taunted by an angry crowd, some members of which chanted, "Gas chamber, gas chamber."[249] After a change of venue to San Diego County, Cooper pleaded guilty to the prison escape count and his trial for murder and attempted-murder opened before Judge Richard Garner and a jury on October 23, 1984.[250]

In addition to the hatchet supposedly taken from the home that Cooper had broken into, the evidence presented by San Bernardino County District Attorney Dennis Kottmeier and Assistant District Attorney John Kochis included a drop of blood of Cooper's type allegedly recovered from the Ryen home, blood of types matching those of Cooper and Douglas Ryen purportedly found on one of the recovered T-shirts, shoeprints purportedly from Pro-Keds Dude tennis shoes Cooper supposedly had obtained from a fellow prisoner who testified for the prosecution, and saliva consistent with Cooper's blood type on cigarette butts purportedly recovered from the Ryen home and from the stolen station wagon, which had been found at Long Beach.[251]

Cooper's defense, as outlined by Santa Barbara County Public Defender David Negus in his opening statement, was that the sheriff's office botched the investigation and that the prosecution evidence would prove less than definitive, leaving reasonable doubt about Cooper's guilt.[252] "I'm not going to be able to prove to you that [Cooper] . . . is innocent," said Negus, who cited the failure to investigate Diana Roper's claims regarding Furrow as an example of how the investigation had been botched.[253] In a vein seemingly more befitting the prosecution than the defense, Negus added that the destruction of the bloody coveralls was "a piece of evidence that could well have no significance whatsoever in this case."[254]

Joshua Ryen did not testify, but Negus agreed to the admission into evidence of electronic recordings of two interviews, conducted in December 1994, in which Joshua said that he had seen only one man, or one man's shadow, during the crime—flatly contradicting his repeated statements six months earlier attributing the crime to three men.[255] The defense contended that the supposed change in Joshua's recollection was the result of manipulation by authorities whose theory was that Cooper alone had committed the crime.[256]

On January 2, 1985, after a twelve-day holiday break in the trial, the prosecutors informed Negus that the San Bernardino County Sheriff's Department had interviewed two state prisoners who corroborated both Joshua's initial contention that three men had carried out the attack and Diana Roper's contention that Furrow likely was involved.[257] In the first interview, on December 17, 1984, a prisoner named Anthony Wisely claimed

[249] O'CONNOR, *supra* note 227, at 81 (quoting contemporaneous accounts from the *San Bernardino Sun* and United Press International).
[250] *Id.*
[251] People v. Cooper, 809 P.2d 865, 877–79, 903–04 (Cal. 1991); Edward T. Blake, Forensic Science Associates, Previous Examination and Current Evaluation of Hair Evidence at 2, *In re* Cooper v. Goughnour, No. 04 CV 0656H (S.D. Cal. June 4, 2004) (on file with authors).
[252] O'CONNOR, *supra* note 227, at 121.
[253] *Id.* at 121, 124 (quoting trial transcript).
[254] *Id.* at 121–24 (quoting trial transcript).
[255] *Id.* at 82.
[256] *Id.* at 83.
[257] Petition for Executive Clemency, *supra* note 229, at 49–50.

that his cellmate, Kenneth Koon, had implicated himself and two other men in the crime.[258] In the second interview, conducted two days later, Koon—who had been out of prison from October 11, 1982, to November 7, 1983, and moved in with Diana Roper after Furrow moved out—denied any role in the crime, although he said he was aware that "Lee Farrel [sic] had left bloody coveralls at Roper's home.[259]

Judge Garner recognized the tardy disclosure of the interviews deprived Negus of an adequate opportunity to explore Koon's possible involvement in the crime with Furrow, but the only remedy Gardner advanced was to give Negus an hour to review the prisoners' statements.[260] After availing himself of that opportunity, Negus told Garner and opposing counsel that he would not request "any further delay at this point in time," although "there might be a time later on when I might need a day or two's delay to get it all together."[261] Ten days later, a defense investigator interviewed Wisely, who said that, in light of his conversation with Koon, he had no doubt of Cooper's innocence, but Negus pursued the matter no further and the jury did not hear of Wisely and Koon's statements.[262]

In their summations, Kochis, the assistant district attorney, told the jury that the evidence proved Cooper's guilt "beyond any doubt,"[263] while Negus contended that it proved nothing of the sort.[264] Negas argued that if a detective recorded an interview that he conducted with Joshua Ryen nine days after the crime the recording would have established a "rational interpretation of the evidence" consistent with Cooper's innocence.[265] In rebuttal, Kottmeier, the district attorney, asserted falsely that Joshua consistently maintained that there had been only one attacker—"Kevin Cooper with a hatchet in one hand and a knife at the other."[266]

After both sides rested, Judge Garner instructed jurors on the law and admonished them not to be influenced by demonstrators who had appeared outside the courthouse carrying signs saying "Kill Cooper" and "Hang the Nigger."[267] Having heard 141 witnesses and received 788 exhibits, the jury deliberated for six days before finding Cooper guilty on February 19, 1985.[268] Ten days later, the jury unanimously recommended a death sentence, which Garner imposed on May 15.[269] It took the California Supreme Court nearly six years—until May 1991—to decide Cooper's automatic appeal, in which it affirmed his conviction and death sentence, rejecting his claims of police and prosecutorial misconduct, judicial error, ineffective assistance of

[258] *Id.* at 49.
[259] *Id.* at 50.
[260] *Id.*
[261] O'CONNOR, *supra* note 227, at 169 (quoting trial transcript, including Garner's initial reaction to the belated disclosure: "Oh, golly, why couldn't you have given this to [Negus] before, gentlemen?").
[262] *Id.* at 170.
[263] *Id.* at 210.
[264] *Id.* at 213–19.
[265] *Id.* at 216.
[266] Petition for Executive Clemency, *supra* note 229, at 43, 84, 224.
[267] Amy Wallace, *Judge Signs Order Setting Killer's Date for Execution*, L.A. TIMES, Aug. 6, 1991, at A3; *see also* Kristof, *supra* note 236.
[268] O'CONNOR, *supra* note 227, at 227; *see also* Petition for Executive Clemency, *supra* note 229, at 9 (on file with authors).
[269] *Kevin Cooper Timeline of Events*, *supra* note 224.

counsel, and accumulated error.[270] Three years later, with a petition for a state writ of habeas corpus pending, Cooper filed a petition for a federal writ of habeas corpus.[271]

Two years after that the California Supreme Court denied his state habeas and Cooper filed a supplemental federal habeas petition, which was denied by U.S. District Court Judge Marilyn L. Huff in August 1997.[272] In 2001, the U.S. Court of Appeals for the Ninth Circuit affirmed Huff, pronouncing the evidence of Cooper's guilt "overwhelming." [273] In the wake of the Ninth Circuit decision, Cooper and the prosecution agreed to the DNA testing of certain forensic evidence[274]—testing that resulted in what the prosecution contended was proof positive of guilt—Cooper's blood on the recovered tan T-shirt.[275]

In an application for the Ninth Circuit's permission to file a successor habeas petition, however, Cooper alleged that the blood had been planted.[276] In requesting the permission—required by the 1996 federal Anti-Terrorism and Effective Death Penalty Act[277] and case law[278]—Cooper claimed actual innocence and sought testing of the blood on the T-shirt for the presence of a preservative that, if found, would indicate that the blood had been planted.[279] He also sought mitochondrial DNA testing of the hairs found in Jessica Ryen's hand—testing that would either identify or eliminate Cooper as the source of the hairs and, if he were eliminated, perhaps lead to the identity of their source.[280] In support of his claim of actual innocence, Cooper attached a hand-written sworn declaration from a prisoner named James Taylor recanting his trial testimony that he had provided tennis shoes to Cooper of the type that supposedly left the shoeprints linking him to the crime.[281]

On February 8, 2004, two days before Cooper's scheduled execution, a three-judge panel of the Ninth Circuit denied permission for filing the successor petition, but the next day an eight-to-three majority of the full Ninth Circuit reversed the panel, not only

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[270] People v. Cooper, 809 P.2d 865, 885–91, 893–901, 904–05, 912 (Cal. 1991).
[271] Cooper v. Calderon, 255 F.3d 1104, 1108 (9th Cir. 2001).
[272] *Id.*
[273] *Id.* at 1110. The decision was two-to-one, but the dissent pertained solely to whether Cooper's death sentence was appropriate. *See id.* at 1115–18 (Browning, J., dissenting).
[274] At the time of Cooper's trial, forensic applications of DNA testing were years in the future. In 1984, Dr. Alec J. Jeffreys, a University of Leicester geneticist, discovered the potential of DNA to identify criminals. Nick Zagorski, *Profile of Alec J. Jeffreys*, 103 PROC. NAT'L ACAD. SCI. 8918, 8919 (2006). The technique led to the 1988 conviction of the killer of two girls in England. JOSEPH WAMBAUGH, THE BLOODING (1989). In 1989, advancing DNA technology exonerated Gary Dotson in Illinois. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 4 (2009).
[275] Cooper v. Calderon, No. 98-99023, 2003 U.S. App. LEXIS 27035, at *2 (9th Cir. 2002).
[276] Cooper v. Woodford, 358 F.3d 1117, 1125 (9th Cir. 2004) (en banc).
[277] 28 U.S.C. § 2244(b)(2)(B) (2012).
[278] Schlup v. Delo, 513 U.S. 298, 299 (1995) (holding that to bring a second habeas petition "a petitioner must show that, in light of all the evidence, including new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt").
[279] *Woodford*, 358 F.3d at 1119.
[280] *Id.* at 1122. Disclosure of exculpatory evidence is required by *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In 1996, the FBI began testing mitochondrial DNA, the principal type of forensic evidence extracted from hair shafts. *See* Frederika A. Kaestle et al., *Database Limitations on the Evidentiary Value of Forensic Mitochondrial DNA Evidence*, 43 AM. CRIM. L. REV. 53, 54, 62 (2006).
[281] *See Woodford*, 358 F.3d at 1122; Blake, *supra* note 251 and accompanying text.

staying Cooper's execution and allowing him to file his successor habeas petition, but also sending the case back to Judge Huff with directions to allow the DNA testing Cooper requested.[282] Two Ninth Circuit judges would have gone further, directly ordering the DNA testing.[283]

After protracted, albeit limited, testing that she characterized as failing to undermine the previous DNA results "confirming" Cooper's guilt, Huff denied the successor federal habeas, as she had the first.[284] A three-judge panel of the Ninth Circuit affirmed Huff,[285] whereupon Cooper sought a rehearing before the full Ninth Circuit, which denied it in 2009 with an order from which Judge William A. Fletcher dissented, pointedly rebutting both Huff's conclusions and the majority's rationale for allowing her decision to stand.[286] "There is no way to say this politely," Fletcher wrote, "The district court failed to provide Cooper a fair hearing and flouted our direction to perform the two tests."[287]

The most telling indication of tampering was a tube of what was supposed to be Cooper's blood that had been in the possession of the sheriff's office since shortly after his arrest.[288] Testing conducted while the successor petition was pending before Huff showed that the tube contained the blood of two persons—Cooper and someone else—indicating that some of Cooper's blood had been removed and replaced with the other person's blood so that none would appear missing.[289]

Fletcher's dissent laid out troubling questions about the case, including: Why did Joshua Ryen not recognize Cooper, if he was the lone killer? Why did no fingerprints link Cooper to the crime? Why, with so much blood, was only one drop of what supposedly was Cooper's blood found in the Ryen home? Why was the jury not informed of the bloody coveralls that were turned over to the sheriff's office and destroyed?[290] Four of Fletcher's fellow Ninth Circuit judges joined in his dissent, and two other judges filed separate dissents in which six additional judges joined.[291] Four years later, in a lecture at New York University School of Law, Fletcher offered a possible answer to all of his

[282] *See Woodford*, 358 F.3d at 1118, 1124.
[283] *Id.* at 1124–25 (Silverman, J., dissenting) (contending that, "Since Cooper's guilt can be quickly and definitively determined by means of a simple test, there is no reason not to have it performed prior to his execution. . . .The public cannot afford a mistake. Neither can Cooper.").
[284] Cooper v. Brown, No. 04-CV-656H, 2005 U.S. Dist. LEXIS 46232, at *1, *3, *79–91, *94–116, *149 (S.D. Cal. May 27, 2005).
[285] Cooper v. Brown, 510 F.3d 870, 874 (9th Cir. 2007).
[286] Cooper v. Brown, 565 F.3d 581, 583–608 (9th Cir. 2009) (Fletcher, J., dissenting).
[287] *Id.* at 583.
[288] *Id.* at 607–08.
[289] *Id.*
[290] *Id.* at 581, 632–33.
[291] Eleven Ninth Circuit judges dissented from the majority holding. In addition to Fletcher, in alphabetical order, they were Marsha S. Berzon, Raymond C. Fisher, Susan P. Graber, Alex Kozinski, Richard A. Paez, Harry Pregerson, Johnnie B. Rawlinson, Stephen Roy Reinhardt, Sidney R. Thomas, and Kim McLane Wardlaw. Joining Fletcher's dissent were Paez, Pregerson, Rawlinson, and Reinhardt. Separate dissenting opinions were filed by Fisher, Reinhardt, and Wardlaw. Fisher's dissent stood alone and comprised a single sentence: "I generally agree with Judge Fletcher that we should have taken this case en banc to require the factual inquiry the previous en banc court expected to occur." *Id.* at 635 (Fisher, J., dissenting). Joining in the Reinhardt dissent were Berzon, Garber, Kozinski, and Pregerson. Joining in the Wardlaw dissent were Berzon, Pregerson, Reinhardt, and Thomas.

questions, succinctly summing up his view of Cooper's situation: "'He is on death row because the San Bernardino Sheriff's Department framed him."[292]

His appeals exhausted,[293] Cooper sought clemency from Governor Edmund G. "Jerry" Brown, Jr.,[294] before whom a petition requesting a reprieve of the death sentence and other relief had been pending since February 17, 2016.[295] Brown finally ordered DNA testing in the case on December 24, 2018, two weeks before Brown was succeeded by his lieutenant governor, Gavin Newsom.[296]

The petition Newsom inherited alleges that Cooper was falsely convicted as a result of judicial bias, ineffective assistance of counsel, planting of evidence by the sheriff's office, perjured testimony for the prosecution, withholding of exculpatory evidence, falsified forensic results, and racial discrimination.[297] In addition to the reprieve, the petition asks the governor's office to "undertake a complete investigation" of the case under its auspices, order all additional forensic testing that Cooper's legal team determines should be done, grant the team access to all exculpatory materials in the possession of the sheriff's office, district attorney's office, and state crime laboratory, and, if his innocence is established, grant him freedom.[298]

7. Thomas Jesse Ward and Karl Allen Fontenot—Oklahoma

At around 8:40 P.M. on April 28, 1984, Donna Denice Haraway, a twenty-four-year-old recently married college student, was abducted from an Ada convenience store known as McAnally's where she worked.[299] The following November 7, although Haraway's body had not been found, Thomas Jesse Ward and Karl Allen Fontenot, both in their early twenties, were charged with robbing, abducting, raping, and killing her.[300]

The *sine qua non* of the prosecution case—and the only evidence that Haraway had been raped, or slain, for that matter—were video-taped statements in which Ward and Fontenot described dreams they reported having about the crime.[301] The purported dreams differed in material respects,[302] but in both the victim had died of multiple stab

[292] William A. Fletcher, U.S. Circuit Judge, Ninth Circuit, Our Broken Death Penalty (Oct. 13, 2013), https://www.youtube.com/watch?v=f9NfqB6y7L4.
[293] The U.S. Supreme Court denied Cooper's petition for a writ of certiorari on November 30, 2009. Cooper v. Ayers, 558 U.S. 1049 (2009).
[294] Brown had opposed the death penalty, but nonetheless had committed himself to carrying out the state law. *See* Jerry Gillam, *Brown Vows to Enforce Death Penalty Law*, L.A. TIMES, Feb. 23, 1977, at 1. In 1960, to no avail, Brown, a former Jesuit seminarian, had urged his father and namesake, then-Governor Edmund G. "Pat" Brown, to ask the state legislature for a moratorium on executions. EDMUND "PAT" BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW 20–21, 39–40 (1989).
[295] Petition for Executive Clemency, *supra* note 229.
[296] Alene Tchekmedyian, *Gov. Jerry Brown Orders New Tests in Quadruple-Murder Case of Death Row Inmate Kevin Cooper*, L.A. TIMES, Dec. 24, 2018, at 1; John Wildermuth & Joe Garofoli, *Gov. Gavin Newsom Promises a 'Progressive, Principled' California*, S.F. CHRONICLE, Jan. 7, 2019, at 1.
[297] Petition for Clemency, *supra* note 229, at 27, 75, 95, 131, 151–52.
[298] *Id.* at 161.
[299] ROBERT MAYER, THE DREAMS OF ADA 2–3, 8–9, 13–14 (1985).
[300] *Id.* at 36, 79–82, 161.
[301] *Id.* at 261–304.
[302] For example, Ward dreamed that he tried to rape Haraway, but could not get an erection. *Id.* at 269, 275. Fontenot, in contrast, dreamed that Ward raped Haraway. *Id.* at 289–91.

wounds, her body either had been burned and left in a concrete bunker on the outskirts of Ada or in a nearby abandoned house that was set afire the next day, and the ringleader of the crime had been a third man—an ex-convict named Odell Titsworth.[303]

The authorities promptly eliminated Titsworth as a suspect because he had suffered a broken arm in a scuffle with police two days before Haraway disappeared and had been physically incapable of the acts attributed to him in the Ward and Fontenot dreams.[304] Once Titsworth was cleared, a reassessment of the prosecution's case against Ward and Fontenot surely was warranted; the false implication of Titsworth, as Ward and Fontenot's lawyers would contend, most likely resulted from "pressure tactics" employed by their interrogators[305]—especially Ada Detective Dennis Smith and Oklahoma Bureau of Investigation Agent Gary Rogers, who obtained a false dream confession from former minor league baseball star Ronald Keith Williamson in 1987.[306]

Despite the false implication of Titsworth, District Attorney William N. Peterson and Assistant District Attorney Chris Ross pressed on with the prosecution of Ward and Fontenot.[307] In addition to playing the defendants' dream videos at the 1985 trial,[308] the prosecutors called three eyewitnesses—two of whom placed Ward and another man at a convenience store known as J.P.'s Pack-To-Go, which was near McAnally's.[309] According to the prosecution theory of the case, Ward and the second man—presumably Fontenot—left J.P.'s in a "mixed red primer and gray primer" pickup truck that they used shortly thereafter in the Haraway abduction; the third eyewitness placed Ward and a second man, as well as a pickup similar to the one seen at J.P's, at McAnally's before Haraway disappeared.[310]

The only other evidence purporting to link Ward and Fontenot to the crime was the testimony of a jailhouse informant, Terri Holland, who claimed that Fontenot confessed to her in the Pontotoc County Jail, implicating Ward.[311] Although the jury was unaware of it, Holland also had testified at Ronald Williamson's trial that Williamson confessed to her in jail.[312] Despite no physical evidence linking them to the Haraway crime,[313] Ward

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[303] *Id.* at 47–48, 80, 271–82; *see also id.* at 283–304.
[304] *Id.* at 264–68; *see also* Fontenot v. State, 742 P.2d 31, 31–32 (Okla. Crim. App. 1987).
[305] MAYER, *supra* note 299, at 330.
[306] JOHN GRISHAM, THE INNOCENT MAN 125–27, 193–94 (2006). Williamson was sentenced to death in 1988 for the murder of Debbie Sue Carter in Ada and exonerated in 1999. Jim Dwyer, *Ronald Williamson, Freed from Death Row, Dies at 51*, N.Y. TIMES, Dec. 9, 2004, at C11.
[307] MAYER, *supra* note 299, at 218–20.
[308] *Id.* at 246–47, 261, 284.
[309] *Id.* at 236–37.
[310] *Id.* at 237. Eyewitness identifications of strangers, as all were in this case, often are unreliable. *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001). Two of the eyewitnesses who identified Ward, including the one who placed him at McAnally's, were tainted because they had seen a composite sketch of a suspect resembling Ward prior to identifying him in lineups. Additionally, the witness who placed Ward at McAnally's had been hypnotized in an effort to enhance his recollection. While the Oklahoma Court of Criminal Appeals concluded that hypnosis, as a technique of memory retrieval, does not meet the evidentiary standard of general scientific acceptance, testimony based on a witness's pre-hypnotic memory is permitted. Robison v. State, 677 P.2d 1080, 1085 (Okla. Crim. App. 1984).
[311] Fontenot v. State, 881 P.2d 69, 78 (Okla. Crim. App. 1994).
[312] GRISHAM, *supra* note 306, at 152–54. False testimony of informants—"snitches," in the vernacular—has been a factor in most wrongful convictions in U.S. capital cases since the 1970's. *See* THE SNITCH SYSTEM, *supra* note 32.

and Fontenot were convicted on September 25, 1985, following a thirteen-day jury trial and sentenced to death thirty days later by Judge Donald E. Powers.[314]

As dubious as the convictions may have been, they became all the more so on January 6, 1986, when—while Ward and Fontenot's appeals were pending—Haraway's body was found.[315] It was not at the location described in the dreams but rather in a field twenty-seven miles away.[316] An autopsy determined that she died not of stabbing but of a single bullet wound to the head and that her body had not been burned.[317] Without considering the exculpatory new evidence,[318] the Oklahoma Court of Criminal Appeals proceeded to reverse the convictions and remand the cases for separate retrials—holding that the admission into evidence of the dream statements at the joint trial deprived each defendant of his right to confront the other.[319]

Although the dreams were incontrovertibly at odds with virtually every significant detail of the crime, the prosecution plowed ahead with retrials, relying primarily on the dream statements and the eyewitnesses who testified at the 1995 trial.[320] Ward and Fontenot's juries returned guilty verdicts, recommending a life sentence for Ward and death for Fontenot.[321] Judge Powers, who presided over both trials as well as the original joint trial, sentenced Ward and Fontenot accordingly.[322] Both convictions were affirmed on direct appeal, but Fontenot's case was remanded for resentencing because the judge had failed to instruct the jury that life without parole was a sentencing option.[323] On remand, the parties negotiated life without parole.[324]

As unjust as convictions relying on fiction-filled "confessions" may seem in retrospect, at the time of the Ward-Fontenot trials the false-confession phenomenon was counterintuitive and in the early days of exploration by social scientists.[325] Gradually,

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[313] Brief in Support of Post-Conviction Relief at 2, Fontenot v. State, 881 P.2d 69 (Okla. Crim. App. 1994) (CR-88-43) [hereinafter Fontenot PC] (on file with authors); Brief in Support of Post-Conviction Relief at 1, 17, Ward v. State, 755 P.2d 123 (Okla. Crim. App. 1988) (CRF-1984-183) [hereinafter Ward PC] (on file with authors).

[314] MAYER, *supra* note 299, at 326–49.

[315] Ward PC, *supra* note 313, at 17.

[316] *Id.*

[317] *Id.*

[318] Direct appeal is limited to the factual record as established in the trial court. *See* DANIEL J. MEADOR & JORDANA S. BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 2 (1994).

[319] Fontenot PC, *supra* note 313, at 32; *see also* Ward v. State, 755 P.2d 123, 124 (Okla. Crim. App. 1988).

[320] Ward PC, *supra* note 313, at 3; *see also* Fontenot PC, *supra* note 313, at 2.

[321] Fontenot v. State, 881 P.2d 69, 71 (Okla. Crim. App. 1994); Ward v. State, No. F-90-0017 (Okla. Crim. App. 1994), at 1 (on file with authors).

[322] Fontenot PC, *supra* note 313, at 87.

[323] *Id.*

[324] Petition for Writ of Habeas Corpus at 10, Fontenot v. Rios, 6:16-cv-00069-JHP-KEW (E.D. Okla. 2016) (on file with authors).

[325] *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998). In 122 capital cases in which exonerations have occurred since the dawning of the DNA forensic age in 1989, false confessions occurred in twenty-three cases, or 18.9 percent. NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-

over ensuing decades, it would be recognized that mentally challenged suspects—as Ward and Fontenot were[326]—"are especially vulnerable to the types of psychological pressure and intimidating interrogation techniques that lead to false confessions."[327]

As it was, however, Ward and Fontenot's cases lay dormant for nearly the next two decades, when the Oklahoma Innocence Project brought a petition for post-conviction relief on Fontenot's behalf.[328] The petition cited Oklahoma State Bureau of Investigation records allegedly withheld from Fontenot's trial and appellate counsel.[329] The records established that Fontenot had a strong multi-witness alibi, corroborated by police dispatch records and police reports, for his whereabouts at the time of the crime.[330]

Although the Oklahoma post-conviction statute sets no time limit for seeking post-conviction relief, [331] Fontenot's petition was denied by Judge Thomas S. Landrith without a hearing in December 2014 based on a legal principle known as laches, which bars claims not brought in a timely fashion.[332] In 2015, the Oklahoma Court of Criminal Appeals affirmed Landrith's decision, and the matter, as of this writing, is the subject of a petition for a federal writ of habeas corpus.[333]

Meanwhile, in 2017, volunteer lawyers from the Chicago-based firm of Sidley Austin LLP and the Center on Wrongful Convictions joined Oklahoma attorney Mark Barrett, who had been instrumental in the Williamson exoneration,[334] in filing a petition for post-conviction relief on Ward's behalf.[335] The petition alleged that the withheld Oklahoma State Bureau of Investigation files show that authorities knew of but failed to inform Ward's trial counsel of alternative suspects[336] and stymied a proper defense by failing to disclose other exculpatory evidence, intimidating witnesses, and knowingly allowing and failing to correct false testimony.[337]

In light of the ongoing proceedings, exoneration remains possible more than three decades after the evidence emanating from the discovery of Haraway's body left no doubt that the dream statements—without which, the petition asserts, there is a

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[326] MAYER, *supra* note 299, at 280, 301.

[327] OKLA. JUSTICE COMM'N, REPORT TO THE OKLAHOMA BAR ASSOCIATION 1, 9 (2013), https://www.prisonlegalnews.org/media/publications/ok_justice_comm_report_convictions_feb_2013.pdf (last visited May 23, 2019).

[328] Fontenot PC, *supra* note 313, at 9.

[329] *Id.* (allegedly in violation of the Due Process Clause of the Fourteenth Amendment).

[330] Fontenot PC, *supra* note 313, at 9.

[331] OKLA. STAT. tit. 22, § 1080 (1970). Even if there were a time limit, it would not bar claims of actual innocence in view of the U.S. Supreme Court's holding that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." McQuiggin v. Perkins, 569 U.S. 383, 386 (2013).

[332] Petition for Writ of Habeas Corpus at 10, Fontenot v. Rios, 6:16-cv-00069-JHP-KEW (E.D. Okla. Feb. 24, 2016) (citing state application for post-conviction relief filed on July 24, 2013, and denied by Judge Thomas S. Landrith on September 17, 2014, without a hearing, based on the state's assertion of laches).

[333] *Id.*

[334] GRISHAM, *supra* note 306, at 298–301.

[335] Ward PC, *supra* note 313.

[336] *Id.* at 6.

[337] *Id.* at 58.

"reasonable probability" that Ward and Fontenot would not have been convicted—were fiction.[338]

8. Jarvis Jay Masters—California

Jarvis Jay Masters was sentenced to death in 1990 for his purported role in the murder of Sergeant Dean Burchfield, a corrections officer at San Quentin Prison, on June 8, 1985.[339] At the time of the crime, Masters was serving a twenty-three-year sentence for a series of 1980 armed robberies.[340] The prosecution alleged that another prisoner, Andre Johnson, stabbed Burchfield to death in culmination of a conspiracy with Masters and a third prisoner, Lawrence Woodard.[341] Johnson and Woodard received life sentences.[342] All three prisoners were alleged members of a prison gang known as the Black Guerilla Family.[343]

Burchfield died of a single stab wound that severed his pulmonary artery.[344] Johnson was linked to the crime by Rick Lipton, a corrections officer, who testified that he had seen Burchfield collapse in front of Johnson's cell.[345] A "homemade spear shaft" was discovered nearby.[346] The star witness against Masters and Woodard was Rufus Willis, also a member of the Black Guerilla Family, who testified under a grant of immunity from prosecution at the 1990 trial for which two juries were empaneled—one for Johnson, one for Masters and Woodard—before Marin County Superior Court Judge Beverly B. Savitt.[347]

Willis told the Masters/Woodard jury that he had been in the prison exercise yard with the defendants and other members of the Black Guerilla Family when they plotted to kill corrections officers.[348] Burchfield was chosen as the first—and it would turn out only—victim.[349] It was agreed that Johnson would carry out the "hit" and Masters would provide the murder weapon.[350]

The prosecution introduced notes—"kites," in prison vernacular—that Willis claimed had been written by Masters describing his role in the murder, and a handwriting expert confirmed that the notes were in Masters's handwriting.[351] In addition, Bobby Evans, a Black Guerilla Family member, testified before both juries that Masters, Woodard, and Johnson had confessed their roles in the killing about a month after it

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[338] *Id.* at 6. *See* Strickler v. Greene, 527 U.S. 263, 281–82, 289 (1999) (quoting Kyles v. Whitley 514 U.S. 419, 433 (1995)).
[339] People v. Masters, 365 P.3d 861, 871–73 (Cal. 2016).
[340] People v. Masters, 134 Cal. App. 3d 509, 514 (1982), *superseded by statute as stated in* People v. Perez, 207 Cal. App. 3d 431 (1989).
[341] People v. Johnson, 19 Cal. App. 4th 778, 794 (1993) (affirming convictions of Johnson and Woodard).
[342] *Id.* at 780.
[343] *Id.*
[344] *Id.* at 783.
[345] *Id.* at 782.
[346] *Id.* at 783.
[347] People v. Masters, 365 P.3d 861, 873 (Cal. 2016).
[348] *Id.* at 872.
[349] *Id.*
[350] *Id.*
[351] *Id.* at 873.

occurred.[352] Regardless of the merits of the cases against Johnson and Woodard, there was a serious problem with the Masters case: At a preliminary hearing, Willis had described Masters as standing five-seven, bespectacled, clean shaven, and free of tattoos, when in fact Masters stood six-one, did not wear glasses, had a mustache and goatee, and had a tattoo on his left cheek.[353]

In addition, before trial, Harold Richardson, a San Quentin prisoner who fit the description Willis had provided of the conspirator alleged to be Masters, confessed to playing the role in the crime Willis attributed to Masters.[354] At the trial, outside the presence of the juries, Masters's counsel called Richardson to the stand, but he refused to testify, citing his right against self-incrimination.[355] The defense asked Judge Savitt to grant Richardson immunity from prosecution and compel him to testify, but she refused.[356] Savitt also denied a defense request to present expert testimony regarding the unreliability of jailhouse informants.[357]

Although upon conviction Johnson and Woodard were sentenced to life in prison without parole,[358] Masters was sentenced to death after a penalty-phase hearing at which a prisoner named Johnny Hoze, a member of the Black Guerilla Family, testified that Masters had bragged about murdering a San Quentin prisoner in 1984.[359] Masters, according to Hoze, called murdering the prisoner "better than sex."[360]

The Johnson and Woodard convictions were affirmed in 1993,[361] but appeals in the Masters case would drag on for another quarter of a century with no end in sight,[362] even though the witnesses whose testimony had led to his conviction and death sentence—Rufus Willis, Bobby Evans, and Johnny Hoze—had recanted with sworn statements saying that they had lied at the trial in the hope of obtaining favorable treatment for themselves.[363] The Willis statement also said that he had coerced Masters, out of fear for his safety, to write the incriminating "kites," which Masters copied from writings of Willis and Woodard.[364] In addition, Andre Johnson, the Masters co-defendant convicted of actually stabbing Burchfield to death, provided a sworn statement saying that Masters had no role in the murder.[365]

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[352] *Id.* at 877. Accusers with incentives to lie were instrumental in a majority of false convictions in U.S. capital cases from the 1970's through the mid-2000's. *See* THE SNITCH SYSTEM, *supra* note 32, at 14.
[353] *See* Brief for Death Penalty Focus as Amicus Curiae in Support of Petitioner-Appellee at 12, Jones v. Davis, 806 F.3d 538 (9th Cir. 2015) (No. 14-56373) (citing Appellant's Opening Brief at 50-51, People v. Masters, No. S016883 (Cal. Ct. App. Dec. 7, 2001)).
[354] *Masters*, 365 P.3d at 882.
[355] *Id.* at 885.
[356] *Id.*
[357] *Id.* at 891.
[358] People v. Johnson, 19 Cal. App. 4th 778, 780 (1993).
[359] Report of Referee Lynn Duryee at 18-21, *In re* Masters (Marin Cty. Super. Ct., Apr. 11, 2011) (No. S130495) [hereinafter Duryee] (on file with authors).
[360] *Id.*
[361] *Johnson*, 19 Cal. App. 4th at 794.
[362] *See generally*, *Masters*, 365 P.3d 861.
[363] Petition for Writ of Habeas Corpus, Ex. 1, In the Matter of Masters, No. 016883 (Cal. Jan. 5, 2005) (Willis declaration) (on file with authors); *id.* Ex. 7 (declaration of Joseph Baxter, attorney for Masters, describing Evans's recantation); *id.* Ex. 31 (Hoze declaration) (on file with authors).
[364] *Id.* Ex. 1, at 4–7.
[365] *Id.* Ex. 2 (Johnson declaration).

In 2004, while Masters's direct appeal was pending before the California Supreme Court, his court-appointed appellate attorneys, Joseph Baxter and Richard I. Targow, filed a petition for a state writ of habeas corpus, citing the recantations and alleging that Masters's conviction and death sentence rested on evidence that the prosecution had known or should have known "was inflammatory, unreliable, untrue, and/or misleading."[366]

Under a 2008 order of the California Supreme Court, Marin County Superior Court Judge Lynn Duyree was appointed as a referee to review questions raised in the habeas petition, but she did not conduct a hearing until 2011.[367] At the hearing, which lasted thirteen days, Duyree heard extensive testimony from Willis and Evans, expert testimony of a forensic linguist who said that the kites used against Masters had been authored by someone other than Masters, and evidence pertaining to the statements of Hoze, who did not testify.[368]At the conclusion of the hearing, Duyree concluded that the evidence she heard did not support issuance of the writ—because she had "scant ability to discern" whether Willis and Evans had lied at the trial or before her,[369] because the unrebutted forensic linguistic testimony, while convincing, did not exonerate Masters, [370] and because Hoze's disavowal of his trial testimony was "not believable." [371] In 2012, Masters's lawyers filed a response in the Supreme Court contending that most of Duyree's findings were not supported by the record or were contrary to law, or both, and arguing that Masters was entitled to habeas relief because "[e]very single piece of post-trial evidence casts fundamental doubt upon [his] conviction and points unerringly to his innocence."[372]

In 2015, Masters's plight was cited in an amicus brief filed by Death Penalty Focus of California in the case of Ernest Dewayne Jones as an example of the state's "exorbitant delays in processing capital cases."[373] A year earlier, a federal judge had held in the Jones case that "the dysfunctional administration of California's death penalty system" rendered it cruel and unusual and therefore unconstitutional.[374] The Ninth Circuit reversed the district court decision, holding that federal courts cannot consider novel constitutional theories on habeas review—but not disagreeing that the state's death

[366] Petition for Writ of Habeas Corpus at 1–2, 11, 48–58, 117, *In re* Masters, No. 10467 (Cal. Dec. 28, 2004) (on file with authors). A California petition for habeas corpus generally must be filed while the direct appeal is pending. *See* OFFICE OF VICTIMS' SERVS., CAL. ATTORNEY GEN.'S OFFICE, A VICTIM'S GUIDE TO THE CAPITAL CASE PROCESS 6, https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf.
[367] Duryee, *supra* note 359, at 1.
[368] *Id.* at 8–13 (discussion of Willis and Evans testimony and recantations); *id.* 14–15 (discussion of forensic linguist Robert Leonard's testimony); *id.* at 18–26 (discussion of Hoze testimony and recantation).
[369] *Id.* at 6.
[370] *Id.* at 15.
[371] *Id.* at 25. For a discussion of how judges often fail to take recantations seriously, see Rob Warden, *Reacting to Recantations, in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 106–16 (Daniel S. Medwed ed., 2017).
[372] Petitioner's Exceptions to Referee's Report at 2–3, 227, *In re* Masters, No. S130495 (Cal. Jan. 2, 2012) (on file with authors).
[373] Brief for Death Penalty Focus as Amicus Curiae in Support of Petitioner-Appellee, *supra* note 353, at 2, 11–14.
[374] Jones v. Chappell, 31 F. Supp. 3d 1050, 1051 (C.D. Cal. 2014), *reversed by* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

penalty system is dysfunctional and that the delay between sentencing and execution is extraordinary.[375]

In 2016—twenty-six years after Masters had been sentenced to death and without reference to evidence adduced in his still-unresolved habeas proceedings—the California Supreme Court finally ruled on his direct appeal, affirming his conviction and sentence.[376] As a result, in early 2019, despite the substantial evidence of innocence, Masters remained on death row—where he became a Buddhist and wrote two books[377]—barred from pursuing relief in the federal courts until his state remedies have been exhausted.[378]

One factor in the delay of the adjudication of the Masters case—the proverbial elephant in the room—may be its political touchiness, in light of the facts that the victim was a corrections officer, that the corrections officers' union is a powerful political force in California,[379] and that members of the California judiciary must stand for election.[380] In November 1986, just short of a year and a half after the Burchfield murder, the perils of appearing soft on crime became apparent in California, when voters ousted three liberal justices of the California Supreme Court, including Chief Justice Rose Elizabeth Bird, whom the *Los Angeles Times* reported "fell victim to a multimillion-dollar campaign that focused on her long record of voting to overturn death sentences."[381]

The Masters case is perhaps just the sort of travesty that Harvard Law School Dean Roscoe Pound had in mind eighty years before the Bird defeat when he opined that "putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[382]

9. Ralph International Thomas—California

The bodies of two Grateful Dead fans—Mary Regina Gioia, twenty-two, of Schenectady, New York, and Gregory Allen Kniffin, eighteen, of Wilton, Connecticut—were found in San Francisco Bay the morning of August 16, 1985.[383] They had been beaten and shot at point-blank range near a Berkeley transient encampment known as

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[375] *Jones*, 806 F.3d at 541, 553.
[376] People v. Masters, 365 P.3d 861, 871 (Cal. 2016).
[377] JARVIS JAY MASTERS, FINDING FREEDOM: WRITINGS FROM DEATH ROW (1997); JARVIS JAY MASTERS, THAT BIRD HAS MY WINGS: THE AUTOBIOGRAPHY OF AN INNOCENT MAN ON DEATH ROW (2009).
[378] *See* 28 U.S.C. § 2254 (2012). Although Masters remains on death row, the chance that he will be executed was diminished when Governor Gavin Newsom declared a moratorium on executions on March 13, 2019. *See A Pause for California's Death Row*, *supra* note 13.
[379] *See* Ed Salzman, *Politicians Protect and Serve the Police*, L.A. TIMES, July 2, 1989, at 3 (describing the California Correctional Peace Officers Association as "the most potent of the [state's] law-enforcement unions").
[380] *See* Nat'l Ctr. for State Courts, *Judicial Selection in the States: California*, JUD. SELECTION IN THE STATES, http://www.judicialselection.us/judicial_selection/index.cfm?state=CA (last visited May 23, 2019).
[381] Frank Clifford, *Voters Repudiate Three of Court's Liberal Justices: Bird Becomes First Chief Justice to Be Ousted in Modern Era*, L.A. TIMES, Nov. 5, 1986, at B1.
[382] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906).
[383] People v. Thomas, 828 P.2d 101, 106–07 (Cal. 1992); Charles Burress, *Ex-Convict Arrested in Berkeley Slaying*, S.F. CHRONICLE, Aug. 27, 1985, at 3. (The article spells the male victim's name "Kniffen," but reported decisions spell it "Kniffin.")

Rainbow Village, where they and other followers of the Grateful Dead had been staying.[384]

Ralph International Thomas, a thirty-one-year-old ex-convict, was arrested ten days after the murders.[385] Following a 1986 jury trial, he was convicted and sentenced to death based solely on circumstantial evidence: that he had been with the victims not long before they were slain, that he had owned what might have been the murder weapon, a Remington .44 Magnum rifle that he claimed had been stolen before the murders and had never been recovered, and that statements attributed to him after his arrest were indicative of guilt.[386]

The defense postulated that the murders had been committed not by Thomas, an African American, but by a white, blond-haired man who had been implicated in the crime by a witness named Vivian Cercy.[387] At a preliminary hearing, Cercy testified that she had seen the victims walking toward the waterfront with the man who was carrying what Cercy thought at the time was a stick, but that could have been a rifle, heard three firecracker-like sounds, and saw the man return from the waterfront and wipe his hands on vegetation.[388] Cercy was unavailable at Thomas's trial, but her preliminary-hearing testimony was read to the jury.[389]

After his conviction and death sentence were affirmed,[390] Thomas sought a state writ of habeas corpus, alleging that his trial counsel, Alameda County Public Defender James Chaffee, had failed to investigate the alternative suspect whom Cercy had described.[391] In 2002, the California Supreme Court ordered an evidentiary hearing at which several witnesses identified the blond man as James Bowen, a Grateful Dead fan known as "Bo."[392] The Supreme Court concluded that Thomas indeed had been deprived of effective assistance of counsel, but nonetheless denied relief because he had failed to show prejudice and because it was "difficult to know" what a competent investigation might have demonstrated two decades earlier.[393]

Thomas next sought a federal writ of habeas corpus, which U.S. District Court Judge Marilyn Hall Patel granted in September 2009, ordering a new trial.[394] Judge Patel was affirmed by the U.S. Court of Appeals for the Ninth Circuit,[395] but Thomas had suffered a series of strokes and seizures and his mental health had deteriorated to a point

[384] *Thomas*, 828 P.2d at 106 n.2.
[385] *Id.* at 107, 111, 125–26. Thomas's prior convictions were for rape, armed robbery, and sodomy. He was born on June 14, 1954. *Ralph International Thomas*, ARRESTFACTS.COM, https://arrestfacts.com/Ralph-Thomas-0i6C13 (last visited May 23, 2019).
[386] *Thomas*, 828 P.2d at 106–09, 113, 122 n.13.
[387] *Id.* at 110, 125.
[388] *Id.* at 111.
[389] *Id.*
[390] *Id.* at 105.
[391] *In re* Thomas, 129 P.3d 49, 50–52 (Cal. 2006).
[392] *Id.* at 51; *see also id.* at 69–70 (Kennard, J., dissenting).
[393] *Id.* at 55, 61–62.
[394] *See* Thomas v. Wong, No. C 93-0616 MHP, 2009 U.S. Dist. LEXIS 131945, at *16–17, *57–58 (N.D. Cal. Sept. 9, 2009) (holding that Chaffee failed to conduct a reasonable investigation into evidence supporting the theory that someone other than Thomas committed the murders).
[395] Thomas v. Chappell, 678 F.3d 1086, 1106 (9th Cir. 2012).

that rendered him incompetent to stand trial.[396] As a result, nearly three decades after he was sentenced to death, Thomas was committed to a state mental health facility, where, his opportunity to establish his innocence foreclosed, he died in January 2014.[397]

10. Ha'im Al Matin Sharif—Nevada

Charles Lamont Robins, later known as Ha'im Al Matin Sharif,[398] was sentenced to death in December 1988 for what a medical examiner deemed the murder of his girlfriend's infant daughter the previous April in Las Vegas.[399] The child, Brittany Smith, suffered extensive injuries—a broken back, broken leg, and internal hemorrhaging[400]—but medical evidence would emerge a quarter of a century later indicating that her injuries were the result of infantile scurvy.[401] In addition, Brittany's mother, Lovell McDowell, who testified in 1988 that Robins had abused Brittany, recanted that testimony and accused police and prosecutors of coercing her to lie by threatening to send her to prison and take away her other three children.[402]

In September 2016, the Nevada Supreme Court, citing "the compelling nature of the new medical evidence" and McDowell's recantation, ordered the trial court to hold an evidentiary hearing on Sharif's innocence claim.[403] Although the Supreme Court found it "more likely than not" that no reasonable juror would have convicted him in light of the new evidence, assuming that it withstood scrutiny at trial,[404] Sharif entered into an agreement with the prosecution under which his conviction and death sentence were vacated in exchange for pleading guilty to second-degree murder—foreclosing the possibility of his exoneration, but effecting his immediate release in 2017.[405] Had he not accepted the deal, Sharif would have remained on death row while pursuing his actual-innocence claim.[406]

At the trial, McDowell testified that she was awakened shortly after 12:30 A.M. on April 19, 1988, by sounds of Brittany gagging or choking and arose to find Robins holding the eleven-month-old and hollering, "Brittany, come on. Brittany, wake up. Wake up Brittany."[407] McDowell called 911 and ran outside, screaming that her baby had

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[396] David Crawford, *A Crumbling Death Penalty System Does Not Benefit Inmates, Especially the Innocent*, CASETEXT (Sept. 1, 2015), https://casetext.com/posts/a-crumbling-death-penalty-system-does-not-benefit-inmates-especially-the-innocent.
[397] *Id.*
[398] Order Changing Name, In the Matter of the Application of Charles Robins (Nev. 7th Dist. Jud. Ct. Mar. 13, 1995) (on file with authors).
[399] Amended Judgment of Conviction, Nevada v. Robins, No. C84005 (Clark Cty. Dist. Ct. Feb. 1, 1989) (on file with authors); *see also* Robins v. State, 798 P.2d 558, 561 (Nev. 1990) (per curiam).
[400] *Robins*, 798 P.2d at 615–16.
[401] Robins v. State, No. 65063, 2016 Nev. Unpub LEXIS 764, at *6–9 (Nev. Sept. 22, 2016).
[402] Declaration of Lovell McDowell (May 5, 2013) (on file with authors).
[403] *Robins*, 2016 Nev. Unpub LEXIS 764, at *13–15.
[404] *Id.* at *14.
[405] Memorandum of Agreement, Nevada v. Robins, No. 88C084005 (Clark Cty. Dist. Ct. May 16, 2017) (on file with authors).
[406] The plea agreement specified that his conviction and death sentence would be reinstated if he attempted further litigation regarding any issues arising from the case. *Id.* at 2–3. For a discussion of why defendants sometimes plead guilty to crimes they did not commit, see Toni Schlesinger, *Plea Bargaining Is Torture*, CHI. LAW., Dec. 1, 1978, at 1 (interview with University of Chicago Law Professor John H. Langbein).
[407] Robins v. State, 798 P.2d 558, 614–15 (Nev. 1990) (per curiam).

stopped breathing.[408] An Air Force sergeant who heard McDowell's screams performed cardiopulmonary resuscitation before paramedics arrived and rushed Brittany to a hospital, where she was pronounced dead.[409]

Dr. Nina Hollander, the state medical examiner, concluded from an autopsy that Brittany died from blunt-force trauma, which could not have resulted from the attempted resuscitation.[410] Robins, then nineteen,[411] was charged with first-degree murder and felony child abuse.[412] Based on Hollander's findings and testimony by McDowell and other prosecution witnesses who claimed to have seen Robins physically abuse Brittany—contrary to findings of medical professionals and child-abuse investigators who examined her on four occasions during the relevant time period and found no abuse[413]—the jury convicted Robins and concluded that Brittany's death involved torture and depravity of mind, thus warranting a death sentence.[414]

Affirming the conviction and sentence, the Nevada Supreme Court held that "abusive treatment by Robins ultimately resulted in the infant's untimely and brutally violent death."[415] Robins would languish on Nevada death row for more than another two decades, losing appeal after appeal,[416] until Cary Sandman, an attorney with the Federal Defender for the District of Arizona, was appointed to the case in 2012.[417]

Sandman lined up two distinguished experts—Dr. Patrick D. Barnes, chief of pediatric neuroradiology at Stanford University Medical Center, and Dr. John Plunkett, a board-certified physician in anatomical, clinical, and forensic pathology who had performed more than 200 autopsies on children under age two—to review Brittany's medical records—from which both concluded to a reasonable degree of medical certainty that Brittany died of undiagnosed and untreated infantile scurvy.[418]

Sandman also tracked down Brittany's mother, who, in addition to recanting her trial testimony, claimed that the other prosecution witnesses who accused Robins of abusing Brittany had lied under oath and that one of those witnesses had admitted to her that he had falsely accused Robins in the hope of receiving leniency in a pending drug case.[419] After agreeing to the plea deal—rendering himself legally, if not in fact, guilty—Sharif walked off of Nevada death row, his home for nearly three decades, and went to live with relatives in Washington State.[420]

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[408] *Id.*
[409] *Id.*
[410] *Id.* at 561–62.
[411] Robins was born on August 31, 1968. Certificate of Live Birth for Charles Lamont Robins, Los Angeles, Cal. (1968) (on file with authors).
[412] Robins v. State, No. 65063, 2016 Nev. Unpub LEXIS 764, at *4 (Nev. Sept. 22, 2016).
[413] *Id.* at *9.
[414] *Robins*, 798 P.2d at 569 n.4.
[415] *Id.* at 560.
[416] *See* Robins v. Baker, No. 2:99-cv-0412-LRH-PAL, 2013 U.S. Dist. LEXIS 158402, at *12–17 (D. Nev. Nov. 4, 2013).
[417] *Id.* at *16.
[418] Brief for Innocence Network as Amicus Curiae Supporting Charles Robins, aka Ha'im Al Matin Sharif, Robins v. Baker at *7, No. 65063 (Clark Cty. Dist. Ct., Sept. 8, 2014); Michael Kiefer, *The Long Journey from Death Row to Freedom*, ARIZ. REPUBLIC (June 15, 2017), https://www.azcentral.com/story/news/local/arizona-investigations/2017/06/15/nevada-death-row-inmate-set-free-arizona-lawyer/394809001/.
[419] Declaration of Lovell McDowell, *supra* note 402, at ¶ ¶ 21–23.
[420] Kiefer, *supra* note 418.

11. Walter Ogrod—Pennsylvania

After his first trial ended with a jury hung eleven-one in favor of acquittal in 1993,[421] Walter Ogrod was convicted and sentenced to death in 1996 following his second trial for the murder of four-year-old Barbara Jean Horn, whose naked, battered body had been found in a plastic trash bag inside a cardboard box near her Northeast Philadelphia home late the afternoon of July 12, 1988.[422] She died of five blows to her head inflicted with what the medical examiner thought might have been a two-by-four.[423] There was nothing to indicate that she had been sexually assaulted.[424]

Minutes before the grisly discovery, which occurred about two and a half hours after the child had been playing in her front yard, four witnesses saw a man carrying the box in which the body would be found—a man the witnesses described as in his mid-twenties or early thirties, standing five-six to five-nine, weighing 165 to 175 pounds, and having either dark or sandy hair.[425] Shortly before the man was seen by those witnesses, another witness who knew the child had seen her walking with a man of similar description.[426] From descriptions provided by two of the witnesses, a police artist prepared a sketch of the suspect, and a third witness deemed the sketch accurate, especially the hair.[427]

The initial suspect was Barbara Jean's step-father, John Fahy,[428] who was in his late twenties, stood five-seven, weighed about 160 pounds, and had short brown hair.[429] But police soon focused on other suspects, including Wesley Ward, who had purchased a television set in the box in which the body was found,[430] and Ross Felice, whom two of the witnesses identified as the man they saw carrying the box, but grand juries declined to indict either man.[431] Police collected organic evidence from the homes of Ward and Felice, as well as from the plastic bag and box in which the body had been found, but the

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[421] Commonwealth v. Ogrod, 839 A.2d 294, 305–06 (Pa. 2002); Dianna Marder, *Mistrial, Melee End Ogrod Trial*, PHILA. INQUIRER, Nov. 5, 1993, at A1; *see also* THOMAS LOWENSTEIN, THE TRIALS OF WALTER OGROD 8–9, 288–89 (2017).

[422] *Ogrod*, 839 A.2d at 306–07, 309; LOWENSTEIN, *supra* note 421, at 5, 8, 10, 302–03; Jack McGuire & Gloria Campisi, *Child's Slaying Has NE in Panic*, PHILA. DAILY NEWS, July 13, 1988, at 1; *Jury Chooses Execution for Walter Ogrod*, PHILA. INQUIRER, Oct. 1, 1996, at B1; Kimberly J. McLarin & Edward Colimore, *Man Held in Child's '88 Killing: Ex-Neighbor of N.E. Phila. Girl*, PHILA. INQUIRER, Apr. 7, 1992, at B1.

[423] *Ogrod*, 839 A.2d at 306–07; LOWENSTEIN, *supra* note 421, at 10.

[424] Postmortem Report at 6, Paul J. Hoyer, M.D. July 12, 1988) ("Oral, rectal, and vaginal smears do not show sperm.") (on file with authors).

[425] LOWENSTEIN, *supra* note 421, at 4–6, 19, 22, 325 n.5 (quoting a police interview on July 12, 1988 with Margaret Kruce, mother of a friend of the murdered child).

[426] *Id.* at 5, 8 (fixing timeframe between the child's disappearance and discovery of her body); *id.* at 21–22, 325 n.4 (quoting July 12, 1988 police interview with Peter Vargas, who had been installing an air conditioner in the area); *see also Ogrod*, 839 A.2d at 308–09 (summarizing trial testimony of witnesses Michael Massi and David Schectman).

[427] LOWENSTEIN, *supra* note 421, at 22.

[428] *See id.* at 10 (quoting Fahy as saying that one officer told him, "We found her, she's dead, and you did it.").

[429] *See id.* at 11 (reporting that Fahy was 22 when he met the victim's mother in 1983); *see also id.* at 17 (describing Fahy).

[430] *Id.* at 27–28.

[431] *Ogrod*, 839 A.2d at 309; LOWENSTEIN, *supra* note 421, at 28–30.

evidence was not subjected to DNA testing.[432] One of the witnesses who had identified Felice also identified yet another suspect, Raymond Sheehan, from a photo.[433]

The case had grown cold by February 1992, when it was reassigned to veteran Philadelphia Detectives Martin Devlin and Paul Worrell.[434] Four months earlier, Devlin had obtained a confession that would prove false after resulting in the conviction of an innocent man for the murder and rape of a seventy-seven-year-old woman.[435] Devlin and Worrell also threatened and physically coerced witness statements and false confessions that had culminated in the conviction of another innocent man for the murder of the seventy-eight-year-old operator of a payday-loan business.[436]

Once assigned to the Horn investigation, Delvin and Worrell began re-interviewing persons who had been interviewed four years earlier—among them Ogrod, who at the time of the crime shared a home in the neighborhood with a couple whose young son, known as "Charliebird," was a friend and playmate of Barbara Jean Horn.[437] In 1990, Ogrod had moved into an apartment above a chandelier shop in suburban Glenside, where Worrell went on April 4, 1992.[438] Ogrod was not at home, but Worrell left his business card at the chandelier shop, asking the owner to ask Ogrod to call the next day.[439] As requested, Ogrod, now twenty-seven, called and, at Worrell's request, drove to the Philadelphia Police Administration Building, known as the "Roundhouse," to be interviewed—not as a suspect, according to the detectives, but as an "informational witness."[440]

Ogrod, who had no criminal record and did not fit the description of the man seen carrying the box,[441] had attended a school for youths with learning disabilities, graduating two years late.[442] "Crazy Walter," as he was known,[443] had served briefly in the Army, from which he received a medical discharge based on a diagnosis of "mixed personality disorder characterized by extreme dependency."[444] One acquaintance said that Ogrod "seemed mentally retarded," [445] and other acquaintances described him as "easily

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[432] Amended Petition for Habeas Corpus Relief at 6, Commonwealth v. Ogrod, CP-51-CR-0532781-1992 (Pa. 1st Dist. Ct. of Common Pleas, June 24, 2011).
[433] *Id.* at 4 n.2.
[434] LOWENSTEIN, *supra* note 421, at 37.
[435] Joseph A. Slobodzian, *25 Years Later, Freed by DNA Evidence: 'It's the Greatest Day of My Life'*, PHILA. INQUIRER, Aug. 24, 2016, at A1.
[436] Thomas v. City of Philadelphia, 290 F. Supp. 3d 371, 373–75 (E.D. Pa. 2018).
[437] LOWENSTEIN, *supra* note 421, at 14, 63. Walter's adoptive father, who died in 1984, bequeathed the house to his sister, Walter's aunt, on condition that she allow Walter to live there. *Id.* at 53.
[438] *Id.* at 66–67; *see also* Amended Petition for Habeas Corpus Relief, *supra* note 432, at 8.
[439] LOWENSTEIN, *supra* note 421.
[440] *Id.* at 17, 66, 109; *see also* Commonwealth v. Ogrod, 839 A.2d 294, 311 (Pa. 2002). Ogrod was born on February 3, 1965. *Inmate Search Results*, PA. DEP'T OF CORR., http://inmatelocator.cor.pa.gov/#/Result (search for "Walter Ogrod") (last visited May 23, 2019).
[441] LOWENSTEIN, *supra* note 421, at 24; *see also* Amended Petition for Habeas Corpus Relief, *supra* note 432, at 6.
[442] LOWENSTEIN, *supra* note 421, at 52.
[443] *Id.* at 44.
[444] *Id.* at 51.
[445] Affidavit/Declaration of Steven King dated June 14, 2011, at ¶ 5, Ex. No. 36, Appx. Vol. I, Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532718-1992 (Pa. 1st Dist. Court of Common Pleas, 2011) (on file with authors).

manipulated,"[446] "definitely slow,"[447] and "an easy person to bully."[448] When Ogrod arrived at the Roundhouse, he had been awake for roughly thirty hours, having worked an eighteen-hour shift as a driver for a commercial bakery.[449]

After hours of interrogation, which was not electronically recorded, Ogrod signed each page of a sixteen-page statement—purportedly in his own words, but in Devlin's handwriting— confessing to the murder and attempted sexual assault of Barbara Jean Horn.[450] According to the statement, which Ogrod recanted almost immediately, the four-year-old had come to his house looking for Charliebird,[451] whereupon he lured her into the basement to "play doctor" and tried to force her to perform oral sex.[452] She screamed, prompting him to strike her head at least four times with "what felt like a pipe," but perhaps was a "pull-down bar" from his weight set.[453] He said he then washed her body, put it into a plastic bag, and disposed of it in the box in which it would be found.[454] Ogrod was charged with murder and related sex crimes.[455]

At the 1993 trial, the prosecution relied principally upon the signed confession, which Judge Juanita Kidd Stout held admissible despite a psychiatrist's testimony that it was not in Ogrod's style of speaking.[456] Ogrod took the stand, denying the murder and asserting that, during the hours of interrogation, the detectives had persuaded him—briefly—that he must be guilty.[457] There was no physical evidence linking him to the crime.[458] The murder weapon was not, and would not be, recovered.[459]

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[446] *Affidavit/Declaration of Heidi Guhl dated Feb. 20, 2011, at ¶ 5, Ex. No. 14, Appx. Vol. I,* Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532781-1992 (Pa. 1st Dist. Court of Common Pleas, 2011) (on file with authors).

[447] *Affidavit/Declaration of Kim Ward dated Feb. 18, 2011, Ex. No. 22, Appx. Vol. I, Amended Petition for Habeas Corpus Relief,* Commonwealth v. Ogrod, CP-51-CR-0532781-1992 (Pa. 1st Dist. Court of Common Pleas, 2011) (on file with authors).

[448] Affidavit/Declaration of Tara Doherty dated Apr. 22, 2011, at ¶ 3, Ex. No. 39, Appx. Vol. I, Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532781-1992 (Pa. 1st Dist. Court of Common Pleas, 2011) (on file with authors).

[449] Amended Petition for Habeas Corpus Relief, *supra* note 432 at 13.

[450] *Id.* at 14–16. The length of the interrogation was in dispute. The confession was signed at least fourteen hours after Ogrod arrived at the Roundhouse. Confessions following interrogations in excess of six hours were presumptively inadmissible, but detectives contended that the "six-hour rule" had not been violated because they had regarded Ogrod as an "informational witness"—not a suspect—until he blurted out the confession. LOWENSTEIN, *supra* note 421, at 109–10, 127. Deprivation of sleep has been described as "the most effective torture and certain to produce any confession desired." Ashcraft v. Tennessee, 322 U.S. 143, 150 n.6 (1944) (citing a 1930 report of the Committee on Lawless Enforcement of Law to the Section of Criminal Law and Criminology of the American Bar Association).

[451] LOWENSTEIN, *supra* note 421, at 15; Edward Colimore, *Confession Released in Girl's Slaying*, PHILA. INQUIRER, May 15, 1992, at B1.

[452] Amended Petition for Habeas Corpus Relief, *supra* note 432, at 15.

[453] *Id.* at 15–16.

[454] *Id.*

[455] *Id.* at 25.

[456] LOWENSTEIN, *supra* note 421, at 115–66.

[457] *Id.* at 133–46. Promptly after signing the statement, Ogrod insisted that he had not committed the crime. *Id.* at 84.

[458] Amended Petition for Habeas Corpus Relief, *supra* note 432, at 2.

[459] *Id.* at 2.

After nine hours of deliberation at the end of the eight-and-a-half-day trial, the jury foreman sent a note to Judge Stout stating that the jury was deadlocked eleven to one.[460] Stout summoned the parties to the courtroom, but before court reconvened the foreman informed her that the jury had reached a verdict after all.[461] The acquittal was announced in open court, but when jurors were polled, one said, "I do not agree with the verdict."[462] Stout declared a mistrial.[463]

Charles T. Graham, the jury foreman, who favored acquittal, would explain, "I did not believe that Mr. Ogrod was the source of the confession because when he took the stand it was clear to me that he could not have authored something as sophisticated as the confession. I came to this conclusion because on the stand Mr. Ogrod was not very articulate and had difficulty expressing himself."[464] Graham quoted Alfred Szewczak, the juror who changed his mind after initially agreeing to the acquittal, as telling the other jurors, "Ogrod signed the confession—I have no doubt he's guilty. No amount of duress would make me sign or agree to anything I didn't believe."[465]

Less than two month before Ogrod's 1996 retrial,[466] the prosecution disclosed to his court-appointed lawyer, Mark Greenberg, that two repeat felons, Jay Wolchansky and John Hall, had come forward some eighteen months earlier to claim that Ogrod had confessed to them when the three were in jail together.[467] Wolchansky was an acolyte of Hall, a serial informant known as "the Monsignor" for his success in obtaining confessions, or rather claiming to obtain them.[468] Because the Monsignor "had a lot of baggage," he would not be called to testify against Ogrod, but the acolyte became a principal witness for the prosecution at the retrial.[469] Under the alias Jason Banachowski,[470] Wolchansky testified that Ogrod had admitted luring the victim into his house and trying to force her to perform oral sex, but when "she became hysterical . . . he grabbed a weight bar and smacked her in the head with it."[471] Wolchansky, who claimed that he expected nothing in exchange for his testimony, added that Ogrod had mentioned

[460] Commonwealth v. Ogrod, 839 A.2d 294, 305 (Pa. 2003).
[461] *Id.* at 306
[462] *Id.*
[463] *Id.*
[464] Affidavit/Declaration of Charles T. Graham dated Dec. 12, 2011, at ¶ 5, Ex. No. 5, Appx. Vol. I, Amended Petition for Habeas Corpus Relief,
[465] *Id.* at 91.
[466] A motion to block retrial on double-jeopardy grounds was denied. Commonwealth v. Ogrod, 657 A.2d 52 (Pa. Super. Ct. 1994); *see also* Ogrod v. Pennsylvania, 516 U.S. 1076 (1996) (denial of certiorari). The motion was predicated on the fact that Ogrod's counsel had not requested the mistrial, citing case law to the effect that a second trial following an unrequested mistrial violates the Double Jeopardy Clause of the Fifth Amendment unless the mistrial was manifestly necessary. In Ogrod's case, the mistrial was held to have been manifestly necessary. *Ogrod*, 839 A.2d at 316–17 (citing Commonwealth v. Diehl, 615 A.2d 690 (Pa. 1992)).
[467] Amended Petition for Habeas Corpus Relief, *supra* note 432, at 16–20.
[468] *Id.*, at 118; *see also* Affidavit of Fr. John Bonavitacola ¶ 13, Feb. 1, 2011) (on file with authors); William Bunch, *The Snitch: Career Thief a Master at Dropping the Dime; "Monsignor" Hall Knows How to Elicit Jail Confessions*, PHILA. DAILY NEWS, Feb. 27, 1997, at 1.
[469] LOWENSTEIN, *supra* note 421, at 219 (discussing the decision of Judith Rubino, the prosecutor at the second trial, not to put Hall on the stand); *id.* at 310 (quoting a post-trial interview with Rubino).
[470] The alias was allowed ostensibly to protect Wolchansky and his family. *Ogrod*, 839 A.2d 294, at 327.
[471] Amended Petition for Habeas Corpus Relief, *supra* note 432, at 42.

that his mother—by this time deceased—had accused him of the killing, to which he had replied, "Damn right I did, and if you know what's best for you, you'll keep quiet."[472]

On Greenberg's advice, Ogrod did not testify at the retrial.[473] Greenberg, moreover, presented nothing to rebut the confession testimony, not even challenging the questionable claim that the murder weapon had been a weight bar, focusing instead on the possibility that one of the initial suspects, Ross Felice, had committed the crime.[474] In closing, the prosecutor, Assistant Philadelphia District Attorney Judith Rubino, suggested that Ogrod's silence was indicative of guilt, telling the jury that the "defendant admitted to his mother that he killed Barbara Jean and threatened his own mother; there had been no denial of that."[475] Judge Stout sustained an objection from Greenberg, who would state in chambers that he did not ask for a mistrial because he knew that Stout would tell the jury that defendants were not required to testify.[476]

After instructions, the jury retired and took an initial vote, which was ten-to-two in favor of conviction, according to a journal kept by juror Thomas James, who made the journal available to journalist Thomas Lowenstein.[477] An hour and twenty minutes after deliberations began, court adjourned for the day, but the jury, after deliberating another hour and a half the next day, found Ogrod guilty of murder and attempted involuntary deviate sexual intercourse.[478] The day after that, jurors deliberated less than ninety minutes before unanimously agreeing that Ogrod deserved to die.[479] Judge Stout imposed the death sentence on November 8, 1996.[480]

It was not until more than seven years later that the Pennsylvania Supreme Court affirmed Ogrod's conviction and death sentence,[481] rebuffing his claims that Rubino had impermissibly commented on his silence and that Greenberg had been ineffective in failing to object to the 1993 mistrial.[482] Five months before Ogrod's conviction and death sentence were affirmed, Raymond Sheehan pleaded guilty and was sentenced to life in prison for the murder and rape of a ten-year-old girl the year before the Horn murder in the same neighborhood.[483]

After the U.S. Supreme Court denied certiorari in the Ogrod case,[484] a team of federal community defenders and pro bono attorneys from the Philadelphia firm of Bingham McCutchen LLP[485] brought a petition for a state habeas corpus, proffering new

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[472] *Id.* at 73 (quoting trial transcript).
[473] *Ogrod*, 839 A.2d 294, at 315.
[474] *Id.* at 279, 315.
[475] *Id.* at 324.
[476] *Id.* at 324–25.
[477] LOWENSTEIN, *supra* note 421, at 241, 287; email message from Thomas Lowenstein, author of THE TRIALS OF WALTER OGROD, to Rob Warden (Nov. 14, 2018, 10:58 AM CST) (on file with authors) (stating that James made the journal available to Lowenstein).
[478] LOWENSTEIN, *supra* note 421, at 288.
[479] Linda Loyd, *Jury Chooses Execution for Walter Ogrod*, PHIL. INQUIRER, Oct. 10, 1996, at B1.
[480] Amended Petition for Habeas Corpus Relief, *supra* note 432, at 26.
[481] The decision was rendered on December 20, 2003. *Ogrod*, 839 A.2d at 294.
[482] *Id.* at 324–25, 336, 347.
[483] Jacqueline Soteropoulos, *Life Term in Rape, Murder of Girl, 10*, PHILA. INQUIRER, July 24, 2003, at A1; *see also* Amended Petition for Habeas Corpus Relief, *supra* note 432, at 4 n.2.
[484] Ogrod v. Pennsylvania, 543 U.S. 1188 (2005).
[485] Bingham McCutchen ceased operation in 2014. Julie Triedman, *How Bingham Failed: The Inside Story*, AM. LAW., Jan. 14, 2015, at 60.

evidence that "affirmatively demonstrates" Ogrod's innocence and "undermines and refutes" the prosecution case.[486] The new evidence included a series of affidavits, including one from John Hall, now deceased, stating that Jay Wolchansky, also deceased,[487] had never talked to Ogrod "in any detail" and had obtained all of the information he purported to know about the Horn crime from Hall,[488] one from Hall's widow stating that Hall had told her that Ogrod had not confessed in jail,[489] one from a man who had been in Ogrod's basement shortly after the Horn child's body was found and who saw neither blood nor signs of a clean-up,[490] one from a pathologist with whom the medical examiner who performed the Horn autopsy concurred in the opinion that the murder weapon could not have been the weight bar,[491] one from a witness stating that the man carrying the box had lit a cigarette,[492] and ones from associates of Ogrod attesting that he did not smoke.[493]

The petition alleged that Mark Greenberg had rendered ineffective assistance of counsel at the second trial—principally by failing to pursue evidence of Ogrod's innocence, failing to retain and proffer the testimony of an expert witness regarding the counter-intuitive phenomena of false confessions, and failing to explain why Ogrod, in light of his sleep deprivation and limited intellect, had been especially vulnerable to psychologically coercive interrogation techniques employed by police.[494] The petition also accused the prosecution of withholding evidence, in violation of the U.S. Supreme

[486] Amended Petition for Habeas Corpus Relief, *supra* note 432, at 41.

[487] Hall and Wolchansky died weeks apart in 2006. LOWENSTEIN, *supra* note 421, at 317.

[488] Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532718-1992 (Pa. 1st Dist. Court of Common Pleas, 2011). Hall's fabrication of the Ogrod confession fit into a pattern of informing—including in, but not limited to, the cases of Ernest Priovolos and Thomas DeBlase in Montgomery County, David Dickson in Philadelphia County, and Michael Dirago in Burlington County. *Id.* at ¶ 3.

[489] *Affidavit/Declaration of Phyllis Hall dated Jan. 8, 2009, at ¶ 5, Ex. No. 31, Appx. Vol. III, Amended Petition for Habeas Corpus Relief,* Commonwealth v. Ogrod, CP-51-CR-0532718-1992 (Pa. 1st Dist. Court of Common Pleas, 2011).

[490] Affidavit/Declaration of Harold Vahey dated June 6, 2011, at ¶ 18, Ex. No. 17, Appx. Vol. I, Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532718-1992 (Pa. 1st Dist. Court of Common Pleas, 2011).

[491] Affidavit/Declaration of Marcella Fiero dated Sept. 14, 2010, at ¶¶ 13–15 Ex. No. 23, Appx. Vol. I, Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532718-1992 (Pa. 1st Dist. Court of Common Pleas, 2011).

[492] Affidavit/Declaration of Peter Vargas dated Aug. 24, 2006, at ¶ 9, Ex. No. 30, Appx. Vol. I, Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532718-1992 (Pa. 1st Dist. Court of Common Pleas, 2011).

[493] Affidavit/Declaration of Melanie Ostash dated June 9, 2011, at ¶ 8, Ex. No. 27, Appx. Vol. I, Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532718-1992 (Pa. 1st Dist. Court of Common Pleas, 2011); Affidavit/Declaration of Steven Mulvey (roofing-business operator who employed Walter Ogrod) dated Apr. 27, 2011, at ¶ 5, Ex. No. 27, Appx. Vol. I, Amended Petition for Habeas Corpus Relief, Commonwealth v. Ogrod, CP-51-CR-0532718-1992 (Pa. 1st Dist. Court of Common Pleas, 2011).

[494] *Amended Petition for Habeas Corpus Relief* at 47–50, 54–58, 63–69, 72–85, 112–16; Report of Richard A. Leo, expert on psychological coercion and false confessions, to Andrew Gallo, one of Ogrod's appellate attorneys, at 10–15 (June 2, 2011) (on file with authors).

Court's *Brady* decision,[495] that Hall and Wolchansky had received leniency in exchange for their cooperation in the Ogrod case.[496]

Judge Shelley Robins New,[497] a former Philadelphia assistant district attorney who had worked as a homicide prosecutor alongside Judith Rubino until 1995, was assigned to the case.[498] In April 2013, a little more than twenty-one months after Ogrod's petition was filed, the commonwealth responded with a motion to dismiss the petition without an evidentiary hearing.[499] Despite an ensuing lapse of nearly six years, Judge New had not ruled as of late January 2019.[500]

Ogrod may have reason for optimism, however, in light of what a Philadelphia columnist termed a "seismic shift in the city's criminal-justice climate"[501]—the result of the election of a progressive district attorney, Larry Krasner, who was sworn in on January 1, 2018, to replace R. Seth Williams, who had been district attorney during the pendency of Ogrod's state habeas until he went to federal prison for taking bribes in 2017.[502] On March 16, 2018, Krasner's office informed Judge New that the office's Conviction Review Unit, headed by Patricia Cummings, who had been aggressive in correcting wrongful convictions as head of a comparable unit in Dallas County, Texas, was reviewing the case.[503] The office's communications director, Ben Waxman, confirmed that the office had agreed to extensive state-of-the-art DNA testing,[504] which Williams's administration had opposed.[505] If the DNA testing were to lead to Ogrod's exoneration, he will have served longer after having been sentenced to death than all but three prisoners who have been exonerated by DNA in capital cases.[506]

12. Anibal Garcia Rousseau—Texas

U.S. Environmental Protection Agency investigators David Delitta and James Sullivan were about to join friends for dinner at a Houston restaurant on October 27,

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[495] Brady v. Maryland, 373 U.S. 83 (1963).
[496] Amended Petition for Habeas Corpus Relief, *supra* note 432, at 121–42.
[497] Criminal Docket at 31, Commonwealth v. Ogrod, No. CP-51-CR-0532781-1992 (Pa. 1st Dist. Ct. of Common Pleas) (on file with authors).
[498] LOWENSTEIN, *supra* note 421, at 320.
[499] Commonwealth Motion to Dismiss at 114, *Ogrod*, No. CP-51-CR-0532781-1992 (Apr. 4, 2013) (on file with authors).
[500] Email message from Thomas Lowenstein, author of THE TRIALS OF WALTER OGROD, to Rob Warden (Jan. 24, 2019, 9:48 AM CST) (on file with authors).
[501] Will Bunch, *New Hope for Man Convicted in 1988 Murder*, PHILA. DAILY NEWS, Apr. 6, 2018, at 8.
[502] *See* Jennifer Gonnerman, *Acts of Conviction*, NEW YORKER, Oct. 29, 2018, at 28. Williams was installed as district attorney in January 2010 and went to prison in 2017. Miriam Hill, *R. Seth Williams Installed as Philadelphia D.A.*, PHILA. INQUIRER, Jan. 5, 2010, at A1; Jeremy Roebuck, *Philly DA Seth Williams Pleads Guilty, Goes to Prison*, PHILA. INQUIRER (June 30, 2017), http://www2.philly.com/philly/news/crime/philly-da-seth-williams-xxxxxxxx-20170629.html.
[503] Gonnerman, *supra* note 502, at 28; *see also* Criminal Docket, *supra* note 497, at 31.
[504] Bunch, *supra* note 501.
[505] Commonwealth Motion to Dismiss, *supra* note 499, at 91–93.
[506] Data compiled by authors from the National Registry of Exonerations. Those who served longer than Ogrod has served were Leon Brown and Henry McCollum, co-defendants, who served nearly thirty years in North Carolina for a rape and murder they did not commit, and Paul G. House, who served slightly more than twenty-two years in Tennessee for a murder he did not commit. *Paul G. House*, NAT'L REGISTRY OF EXONERATIONS, *supra* note 4, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3307.

1988, when a man armed with what Sullivan described as a silver, chrome, or nickel revolver "popped up" from between parked cars in the parking lot and robbed them.[507] Delitta drew a gun from an ankle holster and exchanged fire with the robber, who fled on foot.[508] Delitta died the next day of a .38- or .357-caliber bullet wound.[509]

From a description provided by Sullivan, police prepared a composite sketch depicting the killer as a dark-complexioned white or Hispanic man, forty-five to fifty-five years old, weighing about 160 pounds, standing five-eight or five-nine, and having medium-length dark hair, a thin mustache, and wrinkled forehead.[510] After a robbery detective noted that the man depicted in the sketch resembled Anibal Garcia Rousseau, a forty-seven-year-old drug addict who supported his addiction by committing armed robberies, Sullivan identified Rousseau from a photo array as the killer.[511] On November 7, ten days after Delitta died, police announced that Rousseau was being sought as a suspect.[512] He remained at large until December 9, when a television reporter arranged his surrender.[513]

On March 9, 1989, three months to the day after Rousseau gave himself up, the bullet-riddled body of Leo Williams was found in a ditch in southeast Houston.[514] Five days later, when a thirty-eight-year-old drunk driver, Juan Alfredo Guerrero, was involved in a traffic accident, a witness saw him throw a weapon into a field, where police recovered it.[515] On April 13, a ballistics test determined that the bullets that killed Williams and Delitta had been fired from the recovered weapon—a black .38-caliber Rohm revolver.[516]

Rousseau's capital murder trial opened on May 8, 1989, with the lead prosecutor, Lorraine Parker, by her account, unaware of the ballistics report.[517] At the trial, Sullivan identified Rousseau as the killer,[518] although, standing just five-six and weighing only 125 pounds, he was considerably smaller than the man Sullivan initially described.[519] Sullivan expressed certainty that the weapon wielded by the killer had been silver,

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[507] Rousseau v. State, 855 S.W.2d 666, 673–74 (Tex. Crim. App. 1993) (en banc); Petition for Writ of Habeas Corpus at 2, 5, 27, 130, Rousseau v. Johnson, No. CV-2588 (S.D. Tex. Dec. 22, 2000) (on file with authors).

[508] *Rousseau*, 855 S.W.2d at 674; Petition for Writ of Habeas Corpus, *supra* note 507, at 2.

[509] Petition for Writ of Habeas Corpus, *supra* note 507, at 2, 27.

[510] *Id.* at 3.

[511] *Id.* at 6 (citing police report).

[512] *Id.*

[513] Mike Tolson, *Reasonable Doubt: Death Row Inmate's Trial May Have Had Fatal Flaw*, HOUS. CHRONICLE, Apr. 21, 2002, at A1 (reporting that Rousseau feared that he would have been shot if he had surrendered directly to police) (on file with authors). Williams had been shot three times. Petition for Writ of Habeas Corpus, *supra* note 507, at 18.

[514] Tolson, *supra* note 513.

[515] *Id.*

[516] Petition for Writ of Habeas Corpus, *supra* note 507, at 5, 20, 121.

[517] Tolson, *supra* note 513; *see also* Petition for a Writ of Habeas Corpus, Ex. 12 at ¶ 6, Rousseau v. Johnson, No. 00-CV-2588 (S.D. Tex. Dec. 22, 2000) (affidavit of Lorraine Parker, lead prosecutor at Rousseau's 1989 trial) [hereinafter Affidavit of Lorraine Parker] ("I was not aware of the above mentioned exculpatory information. Because the firearms lab report was contained in my file, however, it is possible that I possessed the report prior to trial, but that I did not recognized its significance. Had I known the significance of this report, I am sure that I would have disclosed this to the defense.").

[518] Rousseau v. State, 855 S.W.2d 666, 674 (Tex. Crim. App. 1993) (en banc).

[519] Petition for Writ of Habeas Corpus, *supra* note 507, at 3 n.1.

chrome, or nickel.[520] Three eyewitnesses testified that Rousseau was not the killer,[521] but Parker argued that Sullivan's testimony was more credible because, owing to his Environmental Protection Agency experience, he had "practically a photographic memory."[522] Rousseau's lawyer wanted to call a forensic psychologist who would have cast doubt on the veracity of Sullivan's identification of Rousseau, but the judge did not allow it.[523] Despite the lack of physical evidence linking Rousseau to the crime, the jury found him guilty and he was sentenced to death on May 17, 1989.[524]

A little more than a month later, police issued a second ballistics report reaffirming that the black Rohm revolver recovered after Guerrero's traffic accident was the weapon used in the slayings of both David Delitta and Leo Williams.[525] Eight months after that, on February 9, 1990, Guerrero was charged with the Williams murder, to which he pleaded guilty a little more than two years later on March 14, 1992, and was sentenced to twelve years in prison.[526] Some nine years after that, in early 2001, Rousseau's appellate lawyers discovered the ballistics reports in a file at the district attorney's office.[527] In a prison interview in June 2001, Guerrero admitted to the Delitta murder to Richard Reyna, an investigator for Rousseau, but then denied it after learning that Delitta had been a federal agent.[528] The following January 28, Guerrero was paroled and deported to the Dominican Republic.[529]

On February 15, 2002, Lorraine Parker, the lead prosecutor at Rousseau's 1989 trial, acknowledged that withholding the ballistics reports violated the U.S. Supreme Court's *Brady* decision[530] and stated that she would not have prosecuted Rousseau if she had known that the same weapon had been used in both the Williams and Delitta killings.[531] The following September 11, the Texas Court of Criminal Appeals remanded the Rousseau case to the trial court to supplement the record for the state habeas proceedings.[532] While the proceedings were pending, Rousseau died in prison at age sixty-five on March 5, 2006, and his quest for exoneration died with him.[533] Parker's experience in the case turned her into an opponent of capital punishment.[534]

13. Dennis Harold Lawley—California

After waiving his right to counsel and representing himself—arguing that he was being framed as a result of his avowed aspiration "to go into history as a Beast in

[520] *Id.* at 5.
[521] *Id.* at 68.
[522] *Id.* at 35.
[523] *Id.* at 65–66.
[524] Steve McVicker, *Inmate Unable to Outlive Appeal*, HOUS. CHRONICLE, Mar. 7, 2006, at B1.
[525] Petition for Writ of Habeas Corpus, *supra* note 507, at 11.
[526] *Id.* at 19.
[527] McVicker, *supra* note 524.
[528] Tolson, *supra* note 513.
[529] *Id.*
[530] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[531] Affidavit of Lorraine Parker, *supra* note 517, at ¶ 10.
[532] *Ex parte* Rousseau, No. WR-43, 534-02, 2006 LEXIS 353, at *1 (Tex. Crim. App. Oct. 11, 2006).
[533] *Id.*; Michael Graczyk, *Death Row Inmate Dies in Hospital*, MIDLAND REP.-TELEGRAM (Midland, TX), Mar. 7, 2006, at A2.
[534] Email message from Lorraine Parker, lead prosecutor at Rousseau's 1989 trial, to Rob Warden (Nov. 30, 2018, 5:02 PM CST) (on file with authors).

Revelations"—Dennis Harold Lawley, a diagnosed paranoid schizophrenic, was convicted and sentenced to death in 1990 on charges that he had hired two men to kill Kenneth Lawton Stewart.[535]

On January 22, 1989, Stewart, who had been released from prison four days earlier, was found dead on the side of a road in Modesto near Butler's Camp, where Lawley lived in a cabin that was said to be "the scene of much drug dealing."[536] The prosecution contended that Stewart, who had been shot twice in the head, had robbed Lawley, who in turn had hired Brian Seabourn and Steven Mendonca to exact deadly revenge.[537]

Lawley was deemed competent to represent himself after a court-appointed psychologist, Philip Trompetter, concluded that, despite two involuntary psychiatric hospitalizations and weird machinations about emulating a Biblical beast, Lawley had "a very sophisticated awareness" of the charges he faced and that his decision to waive counsel, although perhaps imprudent, was "not motivated by a psychotic delusion."[538] During the voir dire, Lawley told prospective jurors that he would introduce testimony to show "that I have for a number of years attempted to go down in history as a Beast in Revelations" and that, as a result, he was being framed.[539] Once the jury was sworn, in its presence, Lawley reiterated the fantasy.[540]

The prosecutor, James C. Brazelton, called four witnesses with purported knowledge of the crime. Ricky Black, a heroin addict who had been charged with helping Seabourn kidnap Stewart, but who had been granted immunity from prosecution in exchange for testifying against Lawley.[541] David Anderson, a paid informant and former heroin addict who claimed to have overheard Lawley arrange the murder.[542] Treva Coonce, Mendonca's heroin-addicted girlfriend whose testimony was damaging to Lawley even though she recanted testimony that she had given at his preliminary hearing implicating him and Seabourn in the murder.[543] Sharon Tripp, another heroin user who testified that before the murder Lawley had told her that he had wanted to kill Stewart for robbing him.[544] William Jerry Chisum, a criminologist from the California Department of Justice, testified—in what Stanislaus County Superior Court Judge Eugene M. Azevedo, the trial judge, described as "probably the most damaging testimony of all"[545]—that a Ruger .357 Magnum pistol recovered in a search of Lawley's cabin had been the murder weapon.[546]

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[535] People v. Lawley, 38 P.3d 461, 470, 475, 478, 485 n.11 (Cal. 2002); Transcript of Proceedings at Probation & Judgment Hearing, People v. Lawley, No. 243109 (Stanislaus Cty. Super. Ct. Feb. 26, 1990) (on file with authors). The "Beast in Revelations" is a reference to one of the beasts described in the "Book of Revelation." *See Revelation*, 13:1-18, 17:8-18.

[536] *Lawley*, 38 P.3d 461 at 470–72; Declaration of Brian Seabourn dated Nov. 18, 1999, at ¶ ¶ 4-6, Ex. 1, Ex. Vol. I, *In re* Lawley, on Habeas Corpus, S089463 (Cal. June 26, 2000).

[537] *Lawley*, 38 P.3d 461 at 471.

[538] *Id.* at 480.

[539] *Id.* at 485 n.11 (quoting voir dire transcript).

[540] *Id.* at 475.

[541] *Id.* at 471–72.

[542] *Id.* at 474–75.

[543] *Id.* at 472–73. Portions of her preliminary-hearing testimony were read into the trial record. *Id.* at 492.

[544] *Id.* at 473.

[545] Transcript of Proceedings at Probation & Judgment Hearing, *supra* note 535, at 94.

[546] *Lawley*, 38 P.3d at 474.

When Lawley called his first witness, a convict named Monty Ray Mullins, the prosecution objected.[547] Judge Azevedo excused the jury, allowing Lawley to make an offer of proof that Mullins and a second proffered defense witness, David Hager, would testify that Seabourn had told them that he had killed someone in Modesto at the direction of the Aryan Brotherhood—and that an innocent man was in jail for the murder.[548] Azevedo held that the allegation that the Aryan Brotherhood had directed the hit was inadmissible hearsay and the claim that an innocent man had been jailed for the crime was inadmissible opinion.[549] As a result, neither Mullins nor Hager testified before the jury.[550]

After Lawley rested his case, Brazelton told the jury that Lawley had been "ripped off" by Stewart and asked, rhetorically, "Did you hear anything in this case at all about anybody [other than Lawley] being mad at Kenneth Stewart for any reason and wanting to kill him? Did you hear that Brian Seabourn was mad at him? Did you hear that Steve Mendonca was mad at him?"[551] On October 10, 1989, the jury, having heard no evidence to that effect, owing to the fact that Judge Azevedo had excluded testimony about the Aryan Brotherhood, found Lawley guilty.[552] On February 26, 1990, after the jury concluded that death was appropriate for Lawley, Azevedo sentenced him accordingly.[553] In separate proceedings, Brian Seabourn was tried and convicted of, and Steven Mendonca pleaded guilty to, second-degree murder.[554]

Lawley's case descended into the California appellate process, which typically takes three decades or more for a condemned defendant to exhaust.[555] In 1993, Scott F. Kauffman was appointed as Lawley's appellate counsel.[556] It took another six years, until November 1999, to complete briefing in Lawley's automatic appeal,[557] in which the principal issue was Lawley's competency to represent himself.[558] The month that the briefing was completed, Seabourn signed a sworn declaration stating that he had slain Stewart at the behest of the Aryan Brotherhood with assistance from immunized prosecution witness Ricky Black,[559] that Lawley was innocent,[560] that "the gun found in Lawley's cabin was not the gun used to kill Stewart,[561] that he, Seabourn, had buried the

[547] *Id.* at 495.
[548] *Id.* at 495–96.
[549] *Id.* at 496.
[550] *Id.* at 472 n.2, 503 n.24; *see also infra* note 554 (referencing Seabourn conviction and Mendonca guilty plea to second-degree murder).
[551] *Lawley*, 38 P.3d at 498–99 (quoting trial transcript).
[552] *Id.* at 493.
[553] Transcript of Proceedings at Probation & Judgment Hearing, *supra* note 535, at 107.
[554] *In re* Lawley, 179 P.3d 891, 894 (Cal. 2008) (quoting People v. Mendonca, No. 255043 (Super Ct. Stanislaus County Super. Ct. 1990); People v. Seabourn, No. 244904 (Super Ct. Stanislaus County 1990)). Seabourn was acquitted of all death-qualifying counts. People v. Lawley, 38 P.3d 461, 505 (Cal. 2002).
[555] Brief of Amicus Curiae Death Penalty Focus in Support of Petitioner-Appellee and Supporting Affirmance, at 3, Jones v. Warden, 9448655 14-56373 (9th Cir. Mar. 6, 2015) (on file with authors).
[556] Petition for Writ of Habeas Corpus at 6, *In re* Lawley, S089463 (Cal. Apr. 29, 2008) (on file with authors).
[557] *Id.*
[558] People v. Lawley, 38 P.3d 461, 484–87 (Cal. 2002).
[559] *Seabourn*, No. 244904, at ¶ 6.
[560] *Id.* at ¶ 8.
[561] *Id.* at ¶ 9.

murder weapon, a Smith & Wesson .357 Magnum, in a field near the murder scene,[562] and that he had told Monty Ray Mullins and David Hager about the murder[563]—as Lawley had attempted, to no avail, to establish at his trial.[564]

"Blood in, blood out"—"you have to kill to get in, and be killed to get out"—was a guiding principle of the Aryan Brotherhood.[565] In December 1988, the month Seabourn was released from prison and moved in with his family in Modesto, Stewart was in "the hat"— meaning that the Brotherhood wanted him dead.[566] Seabourn was in "the tip"—meaning that he aspired to Brotherhood membership.[567] Upon learning that Stewart would be coming to Butler's Camp when he was released from prison on January 18, 1989, Seabourn decided to kill him—but waited four days so that Stewart "could have some fun before he died."[568]

In June 2000, with Lawley's automatic appeal pending, his appellate lawyer, Scott Kauffman, filed a petition for a state writ of habeas corpus alleging that Lawley was innocent and that the prosecution had withheld extensive exculpatory evidence pertaining to Seabourn and the Aryan Brotherhood, in violation of the U.S. Supreme Court's *Brady* decision.[569] Nineteen months after that, in January 2002, the California Supreme Court at long last decided Lawley's automatic appeal, affirming his conviction and death sentence, citing the discovery of the alleged murder weapon in Lawley's cabin as evidence of his guilt and holding that judicial discretion had not been abused in finding Lawley competent to represent himself or in excluding testimony about the Aryan Brotherhood.[570]

Shortly after affirming the conviction and sentence, the California Supreme Court ordered the Attorney General, who represented the state in the proceedings, to show cause why the alleged new evidence would not establish Lawley's innocence and appointed a referee to hear evidence and make factual findings regarding Lawley's claim of innocence related claim that the prosecution had failed to disclose exculpatory evidence.[571] More than a dozen years had passed since Lawley had been sentenced to death, but another two years and ten months would lapse before the referee, Stanislaus County Superior Court Judge John E. Griffin, Jr issued findings on the issues raised in Lawley's habeas petition.[572]

During an extended evidentiary hearing before Griffin, former Aryan Brotherhood members James Brun and Wayne "Smiley" Richardson had testified that the Brotherhood ordered Stewart's murder.[573] Richardson added that he had told Seabourn before his

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[562] *Id.* at ¶ 7.
[563] *Id.* at ¶ 9.
[564] *See supra* notes 548, 549 and accompanying text.
[565] Declaration of Brian Seabourn, *supra* note 536, at ¶ 8.
[566] *Id.* at ¶ 3.
[567] *Id.*
[568] *Id.* at ¶ 5.
[569] Petition for Writ of Habeas Corpus, *supra* note 556, at 24–25 (citing Brady v. Maryland, 373 U.S. 83 (1963)).
[570] People v. Lawley, 38 P.3d 461, 478–87, 495 (Cal. 2002).
[571] *In re* Lawley, 179 P.3d 891, 894, 898, 902 (Cal. 2008).
[572] Referee Report at 4–15, *In re* Lawley, No. 1037325 (Stanislaus Cty. Super. Ct. Dec. 7, 2004) (on file with authors).
[573] Petitioner's Proposed Summary of Evidence and Findings of Fact at 75-90, In re Lawley, No. S089463, (Super Ct. of Stanislaus Cty., Aug. 18, 2004) (on file with authors).

release from prison in December 1988, "If you get the opportunity when you are out there, take care of business"—meaning kill Stewart.[574] Seabourn also testified at the hearing and, when asked by Kauffman's co-counsel, Bicka Barlow, how he knew Stewart, he memorably replied, "I killed him."[575]

While there was "plenty of evidence" that the Brotherhood was involved in Stewart's murder, Griffin opined that it also was clear from the trial testimony of William Jerry Chisum, the state criminalist, corroborated by expert testimony at the evidentiary hearing, that the Ruger .357 Magnum found in Lawley's cabin was the murder weapon, thus linking him to the murder.[576] "I'm sure," Griffin wrote, "that the possession of the gun by Dennis Lawley [was] a very important factor in his conviction."[577]

In December 2007, three years after Griffin returned his findings, Kauffman, Lawley's lawyer, unearthed a Smith & Wesson revolver in the field where Seabourn repeatedly had sworn that he had buried the murder weapon.[578] Kauffman promptly filed a motion to expand the record to include the discovery of the weapon,[579] but the California Supreme Court denied the motion[580] and dismissed Lawley's state habeas petition the following March, adopting Griffin's findings.[581]

Kauffman filed a new state habeas petition,[582] which was pending in June 2009 when court-appointed federal counsel Wesley A. Van Winkle and Lissa J. Gardner filed a petition in U.S. District Court seeking a federal writ of habeas corpus.[583] The petition noted that the only physical evidence purporting to link Lawley to the murder was the Ruger .357 Magnum that evidently had not been the murder weapon, reiterated Lawley's *Brady* claims, and challenged the finding that Lawley had been competent to defend himself in light of his "ludicrous, preposterous, and absurd" ambition to emulate the Beast in Revelations.[584] The strength of the claims would come to naught, however, because on March 11, 2012, before further substantive action in either the state or federal

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[574] *Id.* at 85.
[575] Hearing Transcript at 588–89, *Lawley*, No. 1037325 (on file with authors).
[576] Referee Report, *supra* note 572, at 12.
[577] *Id.* at 12–13.
[578] Protective Petition for Writ of Habeas Corpus at 14, Lawley v. Wong, 08-cv-01425-LJO, (E.D. Cal., June 11, 2009) [hereinafter Protective Petition]. There was no indication that the ballistics testimony had been false or intentionally misleading, but both witnesses had mischaracterized their findings as conclusive. NAT'L RESEARCH COUNCIL, BALLISTIC IMAGING, "Executive Summary," at 3 (2008) https://afte.org/uploads/documents/swggun-nas-summary.pdf ("The validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related tool marks has not yet been fully demonstrated.").
[579] Protective Petition, *supra* note 578, at 14.
[580] *Id.* at 15.
[581] *In re* Lawley, 179 P.3d 891, 904 (Cal. 2008).
[582] Petition for Writ of Habeas Corpus, *In re* Lawley, Related Cases S01449 & S089463 (Cal. Apr. 19, 2008).
[583] Protective Petition, *supra* note 578. The petition contended that its filing was appropriate because federal habeas exists to create justice regardless of "barriers of form and procedural mazes." *Id.* at 370 (citing *Ex parte* McVickers, 29 Cal. 2d 264, 280 (1946)).
[584] Protective Petition, *supra* note 578, at 29, 146, 340–43, 381.

proceedings, Lawley died of natural causes on California death row—his home for the previous twenty-two years and two months.[585]

14. Tyrone Lee Noling—Ohio

The bullet-riddled bodies of Bearnhardt and Cora Hartig, both eighty-one, were found along with ten .25-caliber shell casings on the kitchen floor of their home in Atwater Township, Portage County, on April 7, 1990.[586] Shortly before the bodies were discovered, eighteen-year-old Tyrone Lee Noling had stolen a .25-caliber pistol during a robbery in the nearby town of Alliance and fired it during a second robbery there.[587] Noling was questioned about the Atwater crime, but ballistics tests showed that the pistol he had stolen in Alliance was not the weapon used in the Hartig killings and Noling was not charged.[588]

In 1992, the Portage County prosecutor's office launched a reinvestigation of the case and, in a series of interrogations conducted by investigator Ron Craig, three associates of Noling's implicated him and themselves in the murders—for which Noling then was indicted.[589] The charges were dropped in June 1993,[590] but Noling again was indicted for the crime in August 1995.[591] In the interim, David William Norris, the Portage County prosecutor who had dismissed the charges against Noling, resigned after pleading guilty to possession of cocaine.[592]

Noling volunteered to take a polygraph test, which he passed.[593] In addition to the shell casings on the Hartigs' kitchen floor, police found some open jewelry boxes in a bedroom drawer that apparently had been rifled through, but Noling and his alleged co-conspirators were excluded as sources of fingerprints lifted from the house, the shell casings, and the jewelry boxes.[594] All four also were excluded as the sources of biological material recovered from a cigarette butt found in the driveway of the Hartigs, who were non-smokers.[595] The murder weapon was not recovered.[596]

At Noling's trial, in January 1996,[597] the prosecution relied primarily on the testimony of his associates—Gary St. Clair, Joseph Dalesandro, and Butch Wolcott—with whom Noling had been living and committing crimes in Alliance in 1990.[598] In

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[585] Order Dismissing Action, Lawley v. Chappell, No. 1:08-CV-01425 LJO (E.D. Cal. June 11, 2009) (on file with authors).

[586] State v. Noling, 781 N.E.2d 88, 98 (Ohio 2002). Autopsies determined that Cora Hartig had been shot five times and died of "gunshot wounds to her chest [and] internal injuries" and that Bearnhardt Hartig had been shot three times and died of "gunshot wounds to [his] right chest with multiple visceral injuries." *Id.* at 97.

[587] *Id.*

[588] Merit Brief of Tyrone Noling at 2, Ohio v. Noling, No. 2014-1377 (Ohio 2017) (on file with authors).

[589] *Id.*

[590] *Id.*

[591] Noling v. Bradshaw, No. 5:04 CV 1232, 2008 WL 320531, at *2 (N.D. Ohio Jan. 31, 2008).

[592] *See* Disciplinary Counsel v. Norris, 666 N.E.2d 1087, 1089 (Ohio 1996); Stephanie Kwisnek & Pam Reinhard, *No Jail Sentence for David Norris*, DAILY KENT STATER, Nov. 17, 1994, at 1.

[593] Merit Brief of Tyrone Noling, *supra* note 588, at 9.

[594] *Id.* at 4.

[595] *Id.* at 9–10.

[596] *Id.* at 5.

[597] *Id.*

[598] *Id.* at 1.

exchange for their cooperation, St. Clair and Dalesandro received plea deals and Wolcott was granted immunity from prosecution.[599] Dalesandro and Wolcott told the jury that after they, Noling, and St. Clair had committed the second Alliance robbery they went in Dalesandro's car to Atwater, where Noling and St. Clair entered the Hartig home.[600] Dalesandro testified that he had smelled gun smoke when Noling returned to the car and Wolcott testified that he had seen the smoking weapon.[601]

Before the trial, St. Clair recanted his incriminating statement, but he was called as a hostile witness for the prosecution, which rebutted his recantation by reading his prior statement into the record.[602] The prosecution also called two jailhouse informants who testified that Noling had admitted the murders to them after his arrest for Alliance crimes; one of the informants, Paul Garner, quoted Noling as saying that he did not mean to kill the Hartigs—that it "just happened"—and the other, Ronnie Gantz, claimed that Noling admitted the murders after initially attributing them to St. Clair.[603]

On January 23, 1996, Noling's jury found him guilty and he was sentenced to death twenty-eight days later.[604] On appeal, Noling argued, among other things, that his conviction was "against the manifest weight of the evidence," that he had been denied effective assistance of counsel by his lawyer's failure to adequately investigate the case, and that the prosecution had engaged in misconduct by commenting on potential defense witnesses who had not testified.[605] The Portage County Appellate Court affirmed the conviction and death sentence in 1999 and the Ohio Supreme Court affirmed the appellate court in 2002.[606]

A *Cleveland Plain Dealer* examination of the case in 2006, and a records request by the Ohio Innocence Project and the Ohio Public Defender in 2009, identified two previously undisclosed suspects—Daniel Wilson, whose foster brother claimed that Wilson had admitted the Hartig murders and who had been executed for abducting and burning a young woman alive, and Raymond VanSteenberg, an insurance agent from whom Bearnhardt Hartig had been attempting to collect a $10,000 debt and who had owned a .25-caliber pistol that VanSteenberg claimed he had sold to an unknown person years earlier.[607] In addition, the key witnesses for the prosecution, Dalesandro and Wolcott, recanted their trial testimony, claiming that they had been coerced by the prosecution to falsely implicate themselves in the murders and identify Noling as the killer.[608]

In June 2010, after losing a bid for a federal writ of habeas corpus,[609] Noling's lawyers, in moves that would be rejected by the Court of Common Pleas, sought

[599] *Id.* at 2.
[600] *Id.* at 3.
[601] *Id.*
[602] *Id.*
[603] State v. Noling, 781 N.E.2d 88, 103 (Ohio 2002).
[604] Noling v. Bradshaw, No. 5:04 CV 1232, 2008 WL 320531, at *3 (N.D. Ohio Jan. 31, 2008).
[605] *Noling*, 781 N.E.2d at 102, 109, 111–12.
[606] *Id.* at 118–19; State v. Noling, No. 96-P-0126, 1999 WL 454476, at *32 (Ohio Ct. App. June 30, 1999). The jurisdiction of Ohio appellate courts in capital cases was eliminated by a constitutional amendment approved by voters in November 1994, effective January 1, 1995. *See* State v. Smith, 684 N.E.2d 668, 678 (Ohio 1977).
[607] Merit Brief of Tyrone Noling, *supra* note 588, at 6–8.
[608] *Id.* at 5.
[609] *Bradshaw*, No. 5:04 CV 1232, 2008 WL 320531, at *57 (N.D. Ohio Jan. 31, 2008).

advanced DNA testing, the goal being to link the cigarette butt to one of the alternative suspects, and to get a new trial based on the failure to disclose the existence of the alternative suspects before the 1996 trial.[610] In 2014, the Portage County Appellate Court remanded the case for further development of evidence allegedly withheld in violation of *Brady v. Maryland*,[611] but in 2018 the Ohio Supreme Court affirmed the denial of advanced DNA testing.[612] In January 2019, as Noling passed the twenty-third anniversary of his death sentence, his best hope for freedom, at least in the near term, rested on winning a new trial based on *Brady* violations and subsequent dismissal of the charges.[613]

15. David Ronald Chandler—Alabama (federal)

For a murder that he was convicted of soliciting, David Ronald Chandler, a large-scale marijuana grower and distributor in northern Alabama, became the first person to be sentenced to death under the 1988 federal Anti-Drug Abuse Act.[614]

On May 8, 1990, Charles Ray Jarrell, Sr., who worked for Chandler, admittedly—and indisputably—shot and killed Marlin Shuler, the abusive former husband of Jarrell's half-sister, who also was Chandler's sister-in-law and one of Chandler's marijuana dealers.[615] About two months before Shuler was murdered, based on information he had provided about his ex-wife's drug dealing, police obtained a warrant and searched her home, where they found roughly a kilogram of marijuana and arrested her.[616]

On January 9, 1991, a federal grand jury returned a nine-count indictment charging Jarrell, Chandler, and fourteen others with conspiracy to possess more than a thousand marijuana plants and distribute more than a thousand kilograms of marijuana; with murdering Shuler in furtherance of a criminal enterprise; and with money laundering and firearms violations.[617] Eight days later, in exchange for immunity from prosecution for the murder, Jarrell agreed to plead guilty to conspiracy and testify against Chandler, whose trial was severed from those of the other defendants.[618]

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[610] State v. Noling, 992 N.E.2d 1095, 1098 (Ohio 2013); State v. Noling, No. 2011-P-0018, 2014 WL 1348008, at *5 (Ohio Ct. App. Mar. 31, 2014).
[611] *Noling*, 2014 WL 1348008, at *1, *10; *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963).
[612] State v. Noling, 101 N.E.3d 435, 452 (Ohio 2018).
[613] E-mail from Brian Howe, attorney, Ohio Innocence Project to Rob Warden (Dec. 10, 2018, 09:49 AM CST) (on file with authors).
[614] *Convicted Drug Ringleader Sentenced to Die*, WASH. POST, May 15, 1991, at A20. *See also* 21 U.S.C. § 848(e)(1)(A) (2012), *recognized as repealed by* United States v. Stitt, 552 F.3d 345 (4th Cir. 2008). The act authorizes the death penalty for anyone who counsels an intentional killing in furtherance of a criminal operation. *See The Anti-Drug Abuse Act of 1988*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usam/criminal-resource-manual-68-anti-drug-abuse-act-1988 (last visited May 23, 2019). Four other defendants have been sentenced to death under the act: Angela Johnson, Richard Tipton, Corey Johnson, and James H. Roane Jr. In 2012, Johnson's death sentence, imposed in 2005, was overturned in 2014, and the Justice Department announced that the death penalty would not be sought again in her case. The other three, who were convicted in 1993 of a series of murders in Virginia, remain on death row. *See Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/federal-death-row-prisoners#list (last visited Mar. 19, 2019).
[615] United States v. Chandler, 996 F.2d 1073, 1081–82 (11th Cir. 1993).
[616] *Id.* at 1081.
[617] *Id.* at 1080.
[618] *Id.*

At the trial before U.S. District Court Judge James H. Hancock and a jury in March and April 1991, some forty witnesses testified, but only Jarrell's testimony linked Chandler to the murder.[619] Jarrell testified that Chandler offered him $500 to kill Shuler, but that he thought Chandler was joking until May 8, 1990, when Jarrell and Shuler were at Chandler's home and Chandler told Jarrell that "you better go on and get rid of him" and "I still got that five hundred dollars."[620] After drinking beer for about an hour, Jarrell told the jury that he and Shuler went to a lake, ostensibly for target practice with pistols, and Jarrell shot Shuler to death, but Jarrell did not collect the $500 he claimed Chandler had promised.[621]

Countering Jarrell's testimony, Chandler's lawyer, Drew Redden, introduced evidence of a history of animosity between Jarrell and Shuler, who had abused his ex-wife and mother-in-law—Jarrell's half-sister and mother, respectively—and that Jarrell's account of the murder shifted over time—first, he had not done it, then had done it accidentally, then he had done it out of personal animosity over the abuse, and, lastly, he had done it at Chandler's behest.[622] In 1989, during an argument, Jarrell allegedly had pointed a loaded pistol at Shuler's head and pulled the trigger, but the weapon failed to fire.[623]The jury, accepting Jarrell's final version of the murder, convicted Chandler of all nine counts in the indictment.[624]

After a sentencing hearing at which Redden called only Chandler's wife and mother as character witnesses—not calling a substantial number of other witnesses who would have testified about Chandler's good deeds in life—the jury recommended the death penalty, and Judge Hancock followed that recommendation followed that recommendation.[625] In 1993, the U.S. Court of Appeals for the Eleventh Circuit vacated Chandler's conspiracy conviction, but affirmed his death sentence for the murder, as well as his conviction and prison sentences on the other counts.[626]

In October 1995, under a provision similar to habeas corpus available to prisoners in federal custody,[627] Chandler's lawyers filed a motion, which was amended repeatedly through early 1997, asking Judge Hancock to set aside Chandler's conviction based on ineffective assistance of counsel and other grounds[628]—the most dramatic being a recantation by Jarrell of his trial testimony.[629]

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[619] *Id.* at 1080–81.
[620] *Id.*; United States v. Chandler, 950 F. Supp. 1545, 1553 (N.D. Ala. 1996) (order denying post-conviction claims raised by Chandler), *aff'd*, 218 F.3d 1305 (11th Cir. 2000).
[621] *Chandler*, 950 F. Supp. at 1553, 1569.
[622] *Chandler*, 218 F.3d at 1310–11.
[623] *Chandler*, 996 F.2d at 1082.
[624] *Id.*; *see also Chandler*, 218 F.3d at 1311; United States v. Chandler, 957 F. Supp. 1505, 1507–10 (N.D. Ala. 1997), *overruled in part by* 193 F.3d 1297 (11th Cir. 1999).
[625] *Chandler*, 218 F.3d at 1311; *Chandler*, 957 F. Supp. at 1520. Six years later, more than two-dozen witnesses recalled how Chandler bought shoes for impoverished youths, provided shelter for battered wives, and built a ramp to give a disabled woman easier access to her home. Bill Rankin, *As Drug Lord Awaits Execution, Star Witness Recants Story*, ATLANTA J.-CONST., Feb. 9, 1997, at 13A.
[626] *Chandler*, 996 F.2d at 1107. The execution was set for March 30, 1995 but was stayed on March 21 by Judge Hancock. Bill Rankin, *A Murder Frame-Up by Feds?*, ATLANTA J.-CONST., Mar. 24, 1995, at 11A.
[627] 28 U.S.C. § 2255 (2012).
[628] *Chandler*, 957 F. Supp. at 1506; United States v. Chandler, 950 F. Supp. 1545, 1555 (N.D. Ala. 1996), *aff'd*, 218 F.3d 1305 (11th Cir.).
[629] *Chandler*, 957 F. Supp. at 1506.

At a hearing before Hancock in February 1997, Jarrell, who was suffering from throat cancer and serving a twenty-five-year prison sentence under his plea deal, testified that he committed the murder solely out of animosity over the abuse of his half-sister and mother, and that prosecutors and investigators threatened him and his son with the electric chair unless he falsely implicated Chandler in the crime.[630] In corroboration of Jarrell's recantation, Chandler's attorneys called seven witnesses—three of Jarrell's relatives and four men who were in jail with him before the trial—who testified that Jarrell told them that he was being subjected to, as Hancock put it, "Gestapo-style midnight interrogations and harassment" to force him to testify falsely against Chandler.[631]

Hancock denied relief, speculating, variously, that Jarrell's recantation might have been motivated by his "long relationship and friendship" with Chandler, that Jarrell's memory of events in 1990 was suspect because he "was a very heavy drinker" at that time, and that he perhaps feared that Chandler would retaliate for his betrayal.[632] In 1999, a three-judge panel of the Eleventh Circuit voted two-to-one to vacate the death sentence on the ground that Chandler was denied effective assistance of counsel by his lawyer's failure to call character witnesses during the sentencing phase of the 1991 trial,[633] but the full Eleventh Circuit granted a rehearing en banc and on July 21, 2000, again affirmed Chandler's conviction and death sentence by a six-to-five vote.[634]

In January 2001, while Chandler's appeal to the U.S. Supreme Court was pending,[635] Chandler's attorneys petitioned President Bill Clinton for clemency, contending that, "Our judicial system, like the human beings who administer it, is fallible. Mr. Chandler's sentence of death should be commuted primarily because there is now substantial doubt as to his guilt."[636] One of the attorneys, Jack Martin, summed up the situation to an *Atlanta Journal-Constitution* reporter, "We claim the entire murder case was concocted by law enforcement."[637]

Clemency, in Martin's view, was a long shot, but on January 20, just two hours before Clinton left office, he commuted Chandler's sentence to life without parole.[638] As Chandler passed his twenty-eighth year behind federal bars in early 2019,[639] at least

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[630] *Id.* at 1506, 1511.
[631] *Id.* at 1509–10, 1515.
[632] *Id.* at 1511, 1515.
[633] Chandler v. United States, 193 F.3d 1297, 1310 (11th Cir. 1999); *see* AMNESTY INT'L, AN APPEAL FOR HUMAN RIGHTS LEADERSHIP AS THE FIRST FEDERAL EXECUTION LOOMS 28–29 (2000), https://capitalpunishmentincontext.org/files/resources/federal/AI%20Memo%20to%20Clinton.pdf (last visited May 23, 2019).
[634] Chandler v. United States, 218 F.3d 1305, 1327 (11th Cir. 2000).
[635] Certiorari was denied on February 26, 2001. Chandler v. United States, 531 U.S. 1204 (2001).
[636] Bill Rankin, *Alabama Man Seeks Clemency*, ATLANTA J.-CONST., Jan. 12, 2001, at 12A.
[637] *Id.*
[638] Amy Goldstein & Susan Schmidt, *Clinton's Last-Day Clemency Benefits 176*, WASH. POST, Jan. 21, 2001, at A1; *Clinton's Decision Result of 'Long-Shot' Request*, MONTGOMERY ADVERTISER, Jan. 22, 2001, at C2.
[639] *See Find an Inmate*: *David Ronald Chandler*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmateloc/ (search results for "Reg. No. 17867-001") (last visited May 23, 2019).

thirty-three states and the District of Columbia had moved toward legalizing recreational marijuana—the criminal enterprise that cost Chandler his freedom.[640]

16. Eddie Lee Howard, Jr.—Mississippi

On February 2, 1992, firefighters responded to a report of smoke coming from a Columbus home, where they extinguished a smoldering fire in the living room and found eighty-two-year-old Georgia Kemp dead on her bedroom floor, with a bloody butcher knife on her bed.[641] Dr. Steven Hayne performed an autopsy the next day and reported that Kemp died of two stab wounds to her chest and suffered vaginal injuries "consistent with forced sexual intercourse."[642]

Thirty-eight-year-old Eddie Lee Howard, Jr. perhaps was a logical suspect because he lived just two blocks from the crime scene[643] and twice had been in prison for sex offenses.[644] On February 6, three days after Kemp's burial, Dr. Hayne arranged for her body to be exhumed for examination by a forensic dentist because, as Hayne would put it, there "was some question"—which he had not mentioned in the autopsy report—that she had been bitten.[645] Also on February 6—before the body was exhumed—police detained Howard and took him to a dental office where, with his consent, impressions were made of his teeth.[646] Two days later, based on a comparison of the impressions with bite marks purportedly detected by Dr. Michael West, the dentist who re-examined Kemp's body, police arrested Howard, an African American, for the rape and murder of Kemp, who was white.[647]

Howard had been in custody more than two years when, as a result of a dispute with his court-appointed counsel over delays, he wound up representing himself at his trial, which opened on May 9, 1994, before a Lowndes County jury and a judge named, coincidentally, Lee Howard.[648] The prosecution relied almost exclusively on the testimony of Dr. West, whose forensic qualifications were not challenged by Howard and who proceeded to tell the jury that one of several bite marks he had found on Kemp's body was a "positive match" to Howard's teeth.[649] The only evidence that Kemp had suffered bites was the word of Dr. West; photographs taken by Dr. Hayne during the

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[640] *State Marijuana Laws in 2018 Map*, GOVERNING, http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html (last updated Nov. 7, 2018).
[641] Howard v. State, 701 So. 2d 274, 277 (Miss. 1997).
[642] Steven T. Hayne, Report of Post Mortem Examination (Feb. 3, 1992) (on file with authors).
[643] Howard v. State, 853 So. 2d 781, 784 (Miss. 2003). Howard was born on June 27, 1953. MISS. DEP'T OF CORR., OFFENDER DATA SHEET: EDDIE LEE HOWARD (2012), https://www.mdoc.ms.gov/Death-Row/DeathRowInmates/Howard,%20Eddie%20Lee%20Jr.pdf (last visited May 23, 2019).
[644] Howard had been sentenced to prison in 1972 for assault with intent to ravish and in 1977 for assault with intent to rape and ravish. MISS. DEP'T OF CORR., *supra* note 643; *see also Howard*, 853 So. 2d at 785–86.
[645] Hayne, *supra* note 642; *see also* Motion to Vacate Conviction at 21–22, Howard v. State (Lowndes Cty. Cir. Ct. Sept. 15, 2014) (on file with authors).
[646] *Howard*, 701 So. 2d at 278; *see also Howard*, 853 So. 2d at 784.
[647] *Howard* 701 So. 2d at 278; *see also* Howard v. State, 945 So. 2d 326, 341 (Miss. 2006) (specifying the race of the defendant and victim).
[648] *Howard*, 701 So. 2d at 274–75, 278, 291. Hereinafter, we refer to the defendant as "Howard" and to the judge as "Judge Howard" or "the judge."
[649] *Id.* at 287.

autopsy showed no bite marks.[650] David Turner, a Columbus police officer, testified that Howard had told him, "I had a temper and that's why this happened,"—a statement that Turner said he considered a confession, although he had not contemporaneously memorialized it.[651] Because forensic testing had found neither seminal nor blood evidence, the prosecution left it to the jury to infer, from the autopsy report of vaginal injuries and the bite-mark testimony, that Kemp had been raped.[652]

After three days of testimony and a rambling closing statement by Howard, who went so far as to suggest that one of the jurors might have committed the crime, the jury found him guilty of murder and rape.[653] The same day, after a brief sentencing hearing during which Howard offered nothing in mitigation, the jury sentenced him to death.[654] On June 26, 1997, a little more than three years after the conviction and sentence, the Mississippi Supreme Court reversed the conviction and remanded the case for a retrial, holding that, because Howard had "frequently exhibited behavior which reasonably should have raised a question as to his ability to represent himself," the judge had erred by not holding a competency hearing to determine whether Howard was capable of knowingly and intelligently waiving his right to counsel.[655]

Just short of another three years had passed when Howard's retrial began in May 2000 before another Lowndes County jury and his namesake judge.[656] Howard was represented by two lawyers, Thomas Kesler and Armstrong Walters.[657] During the guilt-innocence phase of the re-trial, Dr. West reiterated his bite-mark testimony from the first trial[658] and Officer Turner again claimed that Howard had made an incriminating statement.[659] This time, the prosecution also called a witness who had not appeared at the first trial: Kayfen Fulgham, a former girlfriend of Howard's, who told the jury that Howard sometimes had bitten her breasts and neck during sex and that, when she had seen him the day after Kemp's body was found, he smelled "like burnt clothes or something, you know, wood, like smoke."[660] Fulgham's testimony was dubious because she had been interviewed three months before Howard's first trial and provided a two-page statement that mentioned neither Howard biting her nor smelling like smoke.[661]

After two days of testimony, Howard again was convicted. After a brief sentencing hearing, at which Howard's attorneys offered no mitigating evidence, the jury returned a death sentence, but when the jury was polled one juror disavowed the verdict.[662]

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[650] Motion to Vacate Conviction, *supra* note 645, at 25 n.92.
[651] *Id.* at 25; *see also Howard*, 945 So. 2d at 334 n.3.
[652] Motion to Vacate Conviction, *supra* note 645, at 21; *see also Howard*, 701 So. 2d at 278.
[653] *Howard*, 701 So. 2d at 279.
[654] *Id.* The foreman of the jury was the father-in-law of the officer who led the investigation that resulted in the charges against Howard. *Id.* at 278.
[655] *Id.* at 282, 284, 288.
[656] Howard v. State, 853 So. 2d 781, 783, 785–86 (Miss. 2003).
[657] *Id.* at 786.
[658] *Id.* at 795–96.
[659] Motion to Vacate Conviction, *supra* note 645, at 24–25.
[660] *Id.* at 28–29.
[661] *Id.* at 29 n.121. On November 3, 2003, according to the director of the Mississippi Office of Capital Post-Conviction Counsel, which represented Howard, Fulgham's daughter stated that her mother had admitted testifying falsely at the trial because Lowndes County DA Forrest Allgood had threatened her with arrest if she refused. Affidavit of Robert M. Ryan at 1–2 (Miss. Aug. 13, 2004) (on file with authors).
[662] *Howard*, 853 So. 2d at 786, 798–99, 807.

Howard's lawyers thereupon asked Judge Howard to impose a life sentence, but he instead told the jurors that a death sentence required unanimity and ordered them to resume deliberating—which they did, returning a unanimous death verdict and affirming it when polled.[663] On appeal, which took another three years-plus, the Mississippi Supreme Court affirmed the conviction and death sentence on July 24, 2003.[664] Howard then brought post-conviction proceedings that dragged on more than four more years before coming to naught when the U.S. Supreme Court declined to review the matter on October 1, 2007.[665]

Howard—represented by the Mississippi Office of Capital Post-Conviction Counsel, the Innocence Project in New York, and the Mississippi Innocence Project—petitioned for a federal writ of habeas corpus and, separately in state court, for DNA testing of biological evidence recovered at the crime scene.[666] In 2008, two African American men who had been falsely convicted of the separate murders of two three-year-old girls in Mississippi based on false reports and testimony by Drs. Hayne and West were exonerated by DNA.[667] Even so, in Howard's case, it was not until December 2, 2010, that the Mississippi Supreme Court ordered the requested testing of, among other items, the butcher knife and the nightgown in which Kemp's body had been found.[668] The tests found no DNA on the nightgown where there would have been saliva, if Kemp had been bitten,[669] and excluded Howard as the source of male DNA on the handle of the butcher knife.[670] In 2012, in an unrelated Mississippi murder case, Dr. West stated in a deposition, "I no longer believe in bite-mark analysis. I don't think it should be used in court. I think you should use DNA, throw bite marks out."[671]

On September 15, 2015, Howard's appellate team filed a motion to vacate his conviction, citing the exculpatory DNA and West's stunning disavowal of bite-mark analysis.[672] Nineteen days later, the Mississippi Supreme Court directed Judge Howard to

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[663] *Id.* at 791.
[664] *Id.* at 784.
[665] Howard v. Mississippi, 552 U.S. 829 (2007); Howard v. State, 945 So. 2d 326, 371 (Miss. 2006) (rehearing denied Jan. 18, 2007).
[666] Howard v. Epps, No. 28:2254 (N.D. Miss. 2007); Motion to Vacate Conviction, *supra* note 645, at 19.
[667] Kennedy Brewer was sentenced to death and spent thirteen years behind bars for the 1992 murder of his girlfriend's three-year-old daughter. Levon Brooks was sentenced to life in prison and spent sixteen years behind bars for the 1990 murder of his former girlfriend's daughter. In both cases, Hayne performed autopsies, purporting to find bite marks, and called in West, who testified at the respective trials of Brewer and Brooks that there was no doubt that the bite marks came from them. DNA tests identified the killer as Justin Albert Johnson, who admitted committing the murders but asserted that he had not bitten either victim. Brewer v. Hayne, 860 F.3d 819, 820–21 (5th Cir. 2017); Brooks v. State, 748 So. 2d 736, 750 (Miss. 1999); Brewer v. State, 725 So. 2d 106, 116 (Miss. 1998); *see also Kennedy Brewer*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/kennedy-brewer/ (last visited May 23, 2019); *Levon Brooks*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/levon-brooks/ (last visited May 23, 2019).
[668] Howard v. State, 49 So. 3d 79, 80 (Miss. 2010).
[669] CELLMARK FORENSICS, INITIAL REPORT OF LABORATORY EXAMINATION at 3 (2014) (on file with authors).
[670] CELLMARK FORENSICS, SUPPLEMENTAL REPORT OF LABORATORY EXAMINATION at 3 (2014) (on file with authors).
[671] Motion to Vacate Conviction, *supra* note 645, at 30 (citing West deposition in Vance v. State, No. 2011-288-LS-LT (Lincoln Cty. Circuit Ct. Feb. 11, 2012)).
[672] Motion to Vacate Conviction, *supra* note 645, at 30, 32.

hold an evidentiary hearing to determine whether Howard was entitled to relief.[673] In 2016, at the mandated evidentiary hearing, West backed down on his 2016 epiphany regarding bite marks, testifying, "I remember having my highest opinion as to the perpetrator who left the bite marks [on Kemp's body]. It was Eddie Lee Howard."[674] On October 10, 2018, Judge Howard denied the motion, asserting that the DNA results did not point to a perpetrator other than Howard—although the male DNA on the knife handle did just that—and holding that West's competence had been litigated at earlier stages and, therefore, was procedurally barred from consideration as a ground for relief.[675] Although Howard had unexhausted state and federal remedies, his probable innocence remained unrequited in early 2019 as, at age sixty-five, he began his twenty-eighth year behind bars for the Kemp murder.[676] The heyday of Drs. Hayne and West had passed—Hayne was barred from performing autopsies and West stopped bite-mark analysis—but there was no official effort to assess the magnitude of their malfeasance before they fell from what the authors of a book about them termed "the powerful institutions that once embraced them."[677]

17. Damien Wayne Echols—Arkansas

The nude, bound, and mutilated bodies of three eight-year-old Cub Scouts—Michael Moore, Christopher Byers, and Steve Branch—were found in a water-filled ditch in an area known as Robin Hood woods near their West Memphis homes on May 6, 1993, a day after they disappeared.[678]

Suspicion arose that the murders had been the work of a satanic cult.[679] Damien Wayne Echols, an eighteen-year-old high school dropout who lived in a trailer park in nearby Marion,[680] seemed a logical suspect because he, as he would acknowledge, had delved into the occult and was familiar with its practices.[681] Echols and a friend, sixteen-year-old Charles Jason Baldwin,[682] were questioned in the early days of the investigation, but there was no basis to arrest them until June 3 when a third youth, seventeen-year-old Jessie Lloyd Misskelley, Jr., whose IQ had been measured at seventy-two, implicated them and himself in the crime.[683]

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[673] Howard v. State, 171 So. 3d 495, 495 (Miss. 2015).
[674] *Post-Conviction Hearing for Eddie Lee Howard*, GEORGE C. COCHRAN INNOCENCE PROJECT (Oct. 5, 2017), http://innocenceproject.olemiss.edu/post-conviction-hearing-for-eddie-lee-howard/.
[675] Order Denying Motion to Vacate at 12, Howard v. State, No. 2000-0115-CV1H 7-11 (Lowndes Cty. Circuit Ct. Oct. 9, 2018) (on file with authors).
[676] MISS. DEP'T OF CORR., *supra* note 643.
[677] RADLEY BALKO & TUCKER CARRINGTON, THE CADAVER KING AND THE COUNTRY DENTIST: A TRUE STORY OF INJUSTICE IN THE AMERICAN SOUTH xxii, 296, 309, 317 (2018).
[678] Echols v. State, 936 S.W.2d 509, 516–17 (Ark. 1996); Misskelley v. State, 915 S.W.2d 702, 706 (Ark. 1996).
[679] MARA LEVERITT, DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE 14–15, 58–59 (2002).
[680] *Id.* at 41.
[681] *Echols*, 936 S.W.2d at 519. Echols had been born Michael Wayne Hutchison but changed his name in 1990 when he was adopted by his stepfather—choosing "Damien," according to some of his classmates, because it was the name of the Antichrist in the horror film *The Omen*, although his family denied that. Marc Perrusquia, *Damien Echols May Be Troubled but He's Not Killer, Some Say*, COM. APPEAL (Memphis), Feb. 27, 1994, at 1.
[682] *Echols*, 936 S.W.2d at 524; LEVERITT, *supra* note 679, at 53.
[683] *Misskelley*, 915 S.W.2d at 706, 712.

On June 7—four days after the arrest of "The West Memphis Three," as the defendants would become known,[684] the *Commercial Appeal* in Memphis, Tennessee, published an account of Misskelley's confession attributing the murders to a cult ritual and stating that he had watched as Echols and Baldwin choked the boys until they lost consciousness and then raped one boy and sexually mutilated another.[685] On its face, Misskelley's confession was dubious because the details he related were at odds with facts of the crime: He asserted that the murders had occurred during the morning of May 5, when in fact they had occurred that evening; that the victims had skipped school that day, when in fact they had not; and that the victims' hands had been bound with brown rope, when in fact their hands and feet had been hogtied with their black and white shoelaces.[686] In addition, there was no indication that any of the victims had been raped.[687]

In 1993, however, the phenomenon of false confessions absent physical coercion was not much appreciated,[688] even though it long had been recognized that youthful suspects, especially those of limited intellect, were vulnerable to psychological manipulation and thus prone to confess to crimes they did not commit.[689] Police are allowed to deceive suspects[690] as they had done during Misskelley's interrogation—telling him that he had failed a polygraph test that he apparently had passed, rendering him, and innumerable youths of limited mental capacity, vulnerable to false self-incrimination.[691]

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[684] "Free the West Memphis Three" became the mantra of a website launched by supporters of the defendants after their convictions were affirmed in 1996. LEVERITT, *supra* note 679, at 291–93.

[685] Bartholomew Sullivan, *Teen Describes 'Cult' Torture of Boys; Defendant Misskelley Tells Police of Sex Mutilation*, COM. APPEAL (Memphis), June 7, 1993, at 1.

[686] Brief of Amici Curiae Ctr. on Wrongful Convictions of Youth & Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Echols at 20–22, Echols v. State, No. CR 83-450a (Craighead Cty. Cir. Ct. Sept. 7, 2009) (on file with authors).

[687] *Id.* at 22.

[688] Several empirical examinations of the phenomenon appeared after the convictions of the "West Memphis Three." *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979 (1997).

[689] *See* Application of Gault, 387 U.S. 1, 45 n.75, 52 (1967) (stating that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children" and citing JOHN HENRY WIGMORE, EVIDENCE § 822 (3d ed. 1940), for the assertion that "under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt").

[690] Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (condoning falsely telling a suspect that his fingerprints had been found at a crime scene); Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (condoning falsely telling a suspect that a co-suspect had confessed).

[691] Misskelley v. State, 915 S.W.2d 702, 711 (Ark. 1996); *see also* Brief of Amici Curiae Ctr. on Wrongful Convictions of Youth & Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Echols, *supra* note 686, at 15–16; Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 17 (2010) (stating that "basic research has revealed that misinformation renders people vulnerable to manipulation"). Other youths known to have confessed to murders they did not commit after being told falsely that they had failed polygraphs include eighteen-year-old Peter Reilly in Connecticut, DONALD S. CONNERY, GUILTY UNTIL PROVEN INNOCENT 15, 63, 346–47 (1977), fourteen-year-old Michael Crowe in California, Mark Sauer & John Wilkens, *He Considered It a Blessing that He Didn't Remember Killing His Sister*, *in* TRUE STORIES OF FALSE CONFESSIONS 5, 6 (Rob Warden & Steven A. Drizin eds., 2009), and sixteen-year-old Jeffrey Deskovic in New York, Fernanda Santos, *DNA Testing Frees Man Imprisoned for Half His Life*, N.Y. TIMES, Sept. 21, 2006, at B1.

Whatever the shortcomings of the confession, Misskelley's jury found it sufficiently persuasive to convict him of the first-degree murder of Michael Moore and the second-degree murder of Christopher Byers and Steve Branch.[692] The prosecutors, John Fogelman and Brent Davis, sought a death sentence, but the jury sentenced Misskelley to life in prison without parole—whereupon Fogelman and Davis told reporters that the sentence might be reduced if Misskelley would testify against Echols and Baldwin, whose joint trial would open eighteen days later.[693]

Misskelley did not take the bait—crediting his father and stepmother with helping him understand that lying to help the prosecutors convict his friends was "something I would have to live with the rest of my life."[694] Ironically, if Misskelley had testified it might have been better for Echols and Baldwin, who would have had an accuser to confront on the witness stand.[695] As it was, the Echols-Baldwin jury would be fully aware of Misskelley's confession—which the jury foreman, Kent Arnold, would term the "primary deciding factor" in his concurrence in the guilty finding in the face of "scanty" and "extremely circumstantial" evidence.[696]

The prosecution evidence at the joint trial included the testimony of two girls who claimed to have overhead Echols say he had killed the boys, of the state medical examiner who told the jury that a knife found in a lake behind Baldwin's parents' home could have been the murder weapon. of a witness who claimed to have seen Echols with a knife similar to the one that had been found, of two witnesses who claimed to have seen Echols near the crime scene the night of the murders, of a state criminalist who claimed that fibers found on the victims' clothing were microscopically similar to fibers recovered from Echols's home, and of a witness who alleged that Echols and Baldwin were members of a cult.[697] In addition, a self-styled expert on occult killings named Dale Griffis, who held what the defense characterized as a mail-order Ph.D. degree from an unaccredited university,[698] testified for the prosecution that the crime had borne the "trappings of occultism," including that it had occurred under a full moon near a pagan holiday and that the number of victims and their ages—three and eight, respectively—were significant in occultism and witchcraft.[699]

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[692] *See Misskelley*, 915 S.W.2d at 707 (The statements "were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration.").
[693] LEVERITT, *supra* note 679, at 190, 192–93.
[694] *Id.* at 212–13.
[695] *See* U.S. CONST. amend. VI (guaranteeing the right of the accused "to be confronted with the witnesses against him"); Brief of Amici Curiae Ctr. on Wrongful Convictions of Youth & Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Echols, *supra* note 686, at 1 (stating that, since Misskelley did not testify, Echols did not have an opportunity to confront him in court).
[696] Brief of Amici Curiae Ctr. on Wrongful Convictions of Youth & Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Echols, *supra* note 686, at 6; Motion for New Trial at 1, Echols v. State, No. CR-93-450a (Craighead Cty. Cir. Ct. Apr. 11, 2008) (on file with authors). The Misskelley trial, at which it had been alleged that Echols and Baldwin "beat, cut, and sexually abused the boys," had been televised and widely reported in newspapers. Joe Stumpe, *Affidavit and DNA Crucial in Appeal of '93 Conviction*, N.Y. TIMES, Sept. 28, 2010, at A16.
[697] Echols v. State, 936 S.W.2d 509, 518–19 (Ark. 1996).
[698] Motion for New Trial, *supra* note 696, at 4; LEVERITT, *supra* note 679, at 236–37.
[699] *Echols*, 936 S.W.2d at 519.

Following their convictions, Echols was sentenced to death, and Baldwin to life in prison without parole.[700] All three convictions were affirmed on direct appeal by the Arkansas Supreme Court, which held that Misskelley's confession had been voluntary—despite its indicia of falsity[701]—and thus sufficient to convict him,[702] that Echols's conviction had rested on "substantial evidence of [his] guilt,"[703] and that all but one of the issues that Baldwin raised were "without merit."[704]

The West Memphis Three, meanwhile, attracted the interest of Mara Leveritt, an award-winning investigative journalist, and became the subject of a 1996 HBO documentary, *Paradise Lost: The Child Murders at Robin Hood Hills.*[705] As time passed, actor Johnny Depp, Pearl Jam lead vocalist-guitarist Eddie Vedder, and Dixie Chicks singer-songwriter Natalie Maines would rally to the cause.[706]

A petition for post-conviction relief brought on Echols's behalf was denied in 2001,[707] but in 2004 the Arkansas Supreme Court granted his motion—and similar motions on behalf of Baldwin and Misskelley—for DNA testing of genetic evidence recovered from the victims and the crime scene.[708] The ensuing testing, conducted by Bode Laboratories with technology that had not existed at the time of the trials, eliminated all three youths as sources of the recovered material and linked some of it to Steven Branch's stepfather, Terry Hobbs, and a man named David Jacoby, who had been with Hobbs when the boys disappeared.[709]

In 2010, the Arkansas Supreme Court ordered a state trial judge to determine whether the DNA evidence invalidated the convictions of the West Memphis Three, but before the hearing could be held the prosecution offered the men immediate release if they agreed to plead guilty, while publicly maintaining their innocence, under the U.S. Supreme Court's *Alford* decision.[710] They took the deal, enabling them to walk free on August 19, 2001—eighteen years, two months, and sixteen days after their arrest.[711]

"I am innocent, as are Jason and Jessie," said Echols, "but I made this decision because I did not want to spend another day of my life behind those bars. I want to live and to continue to fight for our innocence."[712] "It's a total injustice," said John Mark Byers, father of victim Christopher Byers. "These three men are being made to plead guilty to something they didn't do."[713]

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[700] *Id.* at 516.
[701] *Id.* at 525. Under case law, the sole prerequisite for admission of a confession into evidence is voluntariness; reliability is not an issue. *See* Colorado v. Connelly, 479 U.S. 157, 170 (1986).
[702] Misskelley v. State, 915 S.W.2d 702, 712 (Ark. 1996).
[703] *Echols*, 936 S.W.2d at 518–19.
[704] *Id.* at 519, 548–49.
[705] Dave Itzkoff, *A Continuing Murder Mystery Keeps Its Grip on Filmmakers*, N.Y. TIMES, May 7, 2014, at C1.
[706] Stumpe, *supra* note 696.
[707] Echols v. State, 42 S.W.3d 467, 468–69 (Ark. 2001).
[708] Motion for New Trial, *supra* note 696, at 3–4.
[709] *Id.* at 3, 8–9, 46–52.
[710] Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. TIMES, Aug. 19, 2011, at A1; *see also* North Carolina v. Alford, 400 U.S. 25, 37 (1970).
[711] Robertson, *supra* note 710.
[712] Max Brantley, *Damien Echols' Statement on Plea Deal*, ARK. TIMES (Aug. 19, 2011), https://www.arktimes.com/ArkansasBlog/archives/2011/08/19/damien-echols-statement-on-plea-deal.
[713] Blume & Helm, *supra* note 16, at 158.

18. Rodney Reed—Texas

The partially clothed body of nineteen-year-old Stacey Lee Stites was found in thorny brush on the side of a desolate road in Bastrop County on April 23, 1996—eighteen days before her planned marriage to her live-in fiancé, Jimmy Lewis Fennell, Jr., a twenty-three-year-old rookie police officer in the nearby town of Giddings.[714] Stites had been strangled with her belt, and it was obvious from intact sperm heads recovered from her body and the crotch of her underwear that she recently had engaged in sex.[715]

Fennell told investigators that he and Stites had showered together in their apartment in Giddings on the evening of April 22, but they had not engaged in sex because, although she was on birth control pills, there was an elevated risk of pregnancy at that point in her prescription cycle.[716] Stites was scheduled to report for at work at 3:30 A.M. on April 23 in the produce department of the H-E-B grocery store in the town of Bastrop.[717]

Stites went to sleep at about 9:00 P.M, according to Fennell, but he stayed up watching television and was awakened between 6:30 and 7:00 A.M. by Stites's mother, who lived in an apartment one floor below the apartment he and Stites shared.[718] The mother had been notified that her daughter had not arrived at work.[719] An hour or so earlier, a Bastrop County sheriff's officer on routine parole had noticed a truck in the Bastrop High School parking lot and requested a stolen-vehicle check.[720] It was Fennell's truck, which he said Stites had driven to work that day.[721] Her body was found shortly before 3:00 P.M. by a passerby.[722]

DNA tests eliminated Fennell as the source of the recovered sperm and of saliva on Stites's breasts, leading the authorities to surmise that she had been sexually assaulted.[723] In ensuing months, DNA screening eliminated twenty-seven other suspects, including Fennell's friends and fellow officers, Stites's former boyfriends, and her male H-E-B co-workers.[724]

At some point, the authorities focused on Rodney Reed, an African American, who in the months after the murder frequently had been seen walking late at night near Bastrop High School, where the truck from which Stites presumably had been abducted

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[714] *Ex parte* Reed, 271 S.W.3d 698, 702, 704 (Tex. Crim. App. 2008) (denying state habeas corpus). Stites was born on January 19, 1977, and Fennell was born on December 25, 1972. Bastrop Police Dep't Supplementary Report, at 3 (1996) (on file with authors). Fennell is referred to in reported decisions and most pleadings relating to the Stites murder as "Jimmy Fennell," but his full name, as cited elsewhere, is Jimmy Lewis Fennell Jr. *See, e.g.*, Plaintiff's Original Complaint, Lear v. Fennell, No. 1:08-cv-00719-JRN (W.D. Tex. Sept. 23, 2008) (seeking damages from Fennell and the City of Giddings for rape of plaintiff) (on file with authors).

[715] *Reed*, 271 S.W.3d at 704–06.

[716] *Id.* at 703; *see also* Supplemental Application for Writ of Habeas Corpus at 2, *Ex parte* Reed, No. 8701 (Bastrop Cty. Dist. Ct. June 8, 2016) (timeline provided to investigators by Fennell) (on file with authors).

[717] *Reed*, 271 S.W.3d at 702.

[718] *Id.* at 702–03.

[719] *Id.* at 703.

[720] *Id.*

[721] *Id.*

[722] *Id.* at 704.

[723] *Id.* at 705–06, 708, 712.

[724] *Id.* at 707–09.

had been found.[725] The authorities theorized that the location of the truck likely was convenient for the killer; Reed lived six-tenths of a mile away.[726] He was questioned after it was discovered that his DNA profile included him among a tiny fraction of men who could have been the source of the semen and saliva recovered from Stites.[727] Unaware of the DNA link, he falsely denied knowing Stites.[728] In May 1997, Reed, twenty-nine, was indicted for capital murder.[729] He was tried before a Bastrop County jury, convicted, and sentenced to death in May of the following year.[730]

An *Austin American-Statesman* article termed Reed's defense—that he, a black man, had been having an affair with the white fiancée of a white Giddings policeman—"explosive."[731] Specifically, Reed claimed that he and Stites began an affair in November 1995 and that the last time they had engaged in sex was April 21, 1996, or "very early" the next morning.[732] Dr. Roberto J. Bayardo, the Travis County medical examiner who performed the Stites autopsy,[733] estimated that her time of death had been 3:00 A.M. on April 23 and told the jury that the recovered sperm had been deposited shortly before she died.[734] Karen Blakely, a serologist with the Texas Department of Public Safety, testified that sperm can remain intact for no more than twenty-four hours.[735]

In a closing statement that the *American-Statesman* called "devastating and eloquent," the prosecutor, Lisa Tanner, told the jury that the semen was "the smoking gun"— "equivalent to the slipper in the Cinderella story."[736] The jury evidently agreed, convicting Reed on May 18, 1998, of murder and nine days later finding him eligible for a death sentence, which Judge H.R. Townslee imposed.[737] The conviction and sentence were affirmed by the Texas Court of Criminal Appeals on direct appeal in 2000[738] and on a petition for a state writ of habeas corpus in December 2008.[739]

Meanwhile, on May 20, 2008, Jimmy Fennell pleaded guilty to aggravated kidnapping, aggravated sexual assault, having sex with a person in custody, and official

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[725] *Id.* at 709.
[726] *Id.*
[727] *Id.* Reed's DNA was in a state database because he previously had been charged with sexual assault, although not convicted. Mike Ward & Bill Bishop, *Murder in Black and White*, AUSTIN AM.-STATESMAN, Apr. 22, 2001, at A1.
[728] *Reed*, 271 S.W.3d at 709; Ward & Bishop, *supra* note 727.
[729] Reed v. Stephens, 739 F.3d 753, 761 (5th Cir. 2014). Reed was born December 22, 1967. *Death Row Information: Rodney Reed*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_info/reedrodney.html (last visited Mar. 18, 2019).
[730] Mike Kelley, *Reed Sentenced to Death in Bastrop Murder Case*, AUSTIN AM.-STATESMAN, May 29, 1998, at B1.
[731] Ward & Bishop, *supra* note 727.
[732] Rodney Reed Affidavit, Reed v. State, No. 8701 (Bastrop Cty. Dist. Ct. Nov. 21, 2014) (on file with authors).
[733] Medical Examiner's Report, (Apr. 24, 1996) PA-96-0213 (on file with authors).
[734] *Ex parte* Reed, 271 S.W.3d 698, 706 (Tex. Crim. App. 2008).
[735] *Id.* at 704; *see also* Appeal for Writ of Habeas Corpus at 2, *Ex parte* Reed, No. 8701 (Tex. Crim. App. Feb. 4, 2015) (on file with authors).
[736] Ward & Bishop, *supra* note 727.
[737] Dave Harmon, *Jury Convicts Rodney Reed of Murder in Bastrop Case*, AUSTIN AM.-STATESMAN, May 19, 1998, at A1; Kelley, *supra* note 730.
[738] *Ex parte* Reed, WR-50, 961-03, 2005 WL 2659440, at *1 (citing Reed v. State, No. AP-73,135 (Tex. Crim. App. Dec. 6, 2000)).
[739] *Reed*, 271 S.W.3d at 713.

oppression, and was sentenced to ten years in prison.[740] The victim was Connie Iris Lear, twenty at the time of her attack, whose case prompted several other women to come forward with similar allegations.[741] Lear's civil action against Fennell and the Giddings Police Department was settled for $100,000 in 2009.[742] The developments raised, in the words of an *Austin Chronicle* report, "a healthy suspicion that Fennell had some involvement" in his fiancée's murder.[743] Against that backdrop, Dr. Bayardo backed off of his trial testimony about the time of Stites's death, stating in a sworn declaration that that his 3:00 A.M. estimate should not have been "used at trial as an accurate statement."[744]

In February 2015, with Reed's execution scheduled in just two weeks, his appellate lawyers, Bryce Benjet and Andrew F. Macrae, filed a successor petition for a state habeas corpus contending that new evidence proved that the prosecution theory of the crime was "medically and scientifically impossible," and that Reed was innocent.[745] The petition cited opinions of three of the nation's leading forensic pathologists—Drs. LeRoy Riddick, Werner U. Spitz, and Michael M. Baden—who concluded from photographs and video of Stites's body that she had been slain hours earlier than 3:00 A.M.—the time estimate on which the prosecution had relied at Reed's trial.[746] The petition also relied on a sworn statement by a Stites coworker at H-E-B who said that Stites had confided that "she was sleeping with a black guy named Rodney and that she didn't know what her fiancé would do if he found out."[747]

In response to the petition, the Court of Criminal Appeals stayed Reed's execution.[748] While the petition remained pending, Curtis Davis, a close friend of

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[740] Plaintiff's Original Complaint, *supra* note 714, at 6–8; *see also* State Motion to Dismiss Subsequent Appeal for Writ as Abusive at 6, *Ex parte* Reed, WR-50, 961-08 & WR-50, 961-09 (Tex. Crim. App. July 30, 2018) (on file with authors).

[741] Jordan Smith, *Is Texas Getting Ready to Kill an Innocent Man?*, INTERCEPT (Nov. 17, 2014), https://theintercept.com/2014/11/17/is-texas-getting-ready-kill-innocent-man/.

[742] *Id.*; *see also* Final Judgment at 1, Lear v. Fennell, 1:08-cv-00719 (S.D. Tex. Apr. 14, 2009) (on file with authors).

[743] Jordan Smith, *Reed Appeal Unearths Grisly Details on Fennell*, AUSTIN CHRONICLE (May 1, 2009), https://www.austinchronicle.com/news/2009-05-01/774702/.

[744] Declaration of Roberto J. Bayardo at 2, Reed v. Dretka, A-82-CA-142 (W.D. Tex. Aug. 13, 2012) (on file with authors).

[745] Appeal for Writ of Habeas Corpus, *supra* note 735, at 1, 73.

[746] *Id.* at 3; *see also* Affidavit of LeRoy Riddick, retired Alabama state medical examiner, at 5 (Jan. 10, 2015) (stating that the time interval between death and discovery of the body was "significantly longer" than the time lapse estimated at trial) (on file with authors); Affidavit of Werner U. Spitz, board-certified anatomic and forensic pathologist, at 2 (Feb. 4, 2015) (stating that is was impossible that Stites was murdered and left at the scene in the time frame presented at trial) (on file with authors); Affidavit of Michael Baden, former New York City chief medical examiner, at 3 (Feb. 10, 2015) (stating that lividity depicted in the photographic evidence leaves no doubt that Stites died before midnight on April 22, 1996, when she was alone with Fennell) (on file with authors) For a succinct summary of the evidence of Reed's innocence, see Chuck Lindell, *Lawyers for Rodney Reed Assert Innocence in Appeal*, AUSTIN AM.-STATESMAN, Feb. 13, 2015, at A1. Fennell was released from prison in March 2018. Brittany Glas, *Stacey Stites' Fiancé Released from Prison After Serving 10-Year Sentence*, KXAN.COM, https://www.kxan.com/news/crime/stacey-stites-fianc-released-from-prison-after-serving-10-year-sentence/1026871725 (last updated Mar. 9, 2018, 11:58 PM CST).

[747] Affidavit of Alicia Slater at 2 (Dec. 14, 2014) (on file with authors).

[748] State Motion to Dismiss Subsequent Appeal for Writ as Abusive, *supra* note 740, at 6 (citing Order, *Ex parte* Reed, WR-50, 961-07 (Tex. Crim. App. Feb. 23, 2015)).

Fennell's, gave an interview for an upcoming episode of CNN's Death Row Stories attributing incriminating statements to Fennell.[749] At a hearing before Senior District Court Judge Doug Shaver in October 2017, Davis reiterated under oath the substance of what he had told CNN and Fennell asserted his Fifth Amendment right to silence.[750] Shaver denied relief, sending the case back to the Court of Criminal Appeals, where it remained pending in early 2019.[751]

19. Darlie Lynn Routier—Texas

Brothers Damon and Devon Routier, ages five and six, respectively, were stabbed to death in their Dallas County home on June 6, 1996.[752] Their twenty-six-year-old mother, Darlie Lynn Routier, was convicted and sentenced to death in 1997 for her younger son's murder; she was not charged with the older child's death.[753]

Routier testified that, while her husband and an infant son slept upstairs, she was sleeping on a downstairs couch, with her older sons on the floor nearby, when a stranger attacked them with a knife and fled.[754] Although Routier was seriously wounded—"including a slash across her neck that came perilously close to severing her carotid artery"—the prosecution contended that there had been no intruder, that Routier had staged the crime scene, that her wounds had been self-inflicted, and that she had "some pecuniary motive to murder her children."[755]

A significant element of the prosecution case was a video made by a Dallas television station showing Routier spraying Silly String on her sons' graves on the day that Devon would have turned seven.[756] The defense objected that the video was more prejudicial than probative, but Judge Mark Tolle admitted it into evidence[757] and the prosecution argued that the video "gives you a lot of insight into [Routier]. . . . [T]his is not a picture of a grieving mother."[758] The jury—as Routier's mother, Darlie Kee, put it in a *Dallas Morning News* interview—"ended up deliberating on the Silly String."[759]

The conviction and death sentence were affirmed on direct appeal—which largely focused not on sufficiency of the evidence or fairness of the trial, but on problems with

[749] E-mail from Bryce Benjet, Reed's appellate attorney, to author (Feb. 20, 2019, 6:24 PM CST) (on file with authors).
[750] *Id.*
[751] *Id.*; State Motion to Dismiss Subsequent Appeal for Writ as Abusive, *supra* note 740, at 7.
[752] Tasha Tsiaperas, *Did Darlie Routier Kill Her Kids? Doubts Remain Two Decades Later*, DALLAS NEWS (June 3, 2016), https://www.dallasnews.com/news/crime/2016/06/03/did-darlie-routier-kill-her-kids-doubts-remain-20-years-later.
[753] *Id.* Routier was born on January 4, 1970. *Death Row Information: Offenders on Death Row*, *supra* note 73.
[754] Routier v. State, 273 S.W.3d 241, 244 (Tex. Crim. App. 2008).
[755] *Id.* at 244–45. The supposed "pecuniary motive" was a $5,000 life-insurance policy on each child. *Id.* at 258.
[756] Tsiaperas, *supra* note 752.
[757] Transcript of Record at 2515, State v. Routier, No. A96-253 (Kerr Cty. Dist. Ct. Jan. 17, 1997), https://darliefacts.com/jury-trial-transcripts/.
[758] *Id.* at 5238.
[759] Tsiaperas, *supra* note 752.

the trial record.[760] During pendency of the appeal, however, *Texas Monthly* published an article raising the possibility that Routier's husband, Darin Routier, had something to do with the crime.[761] According to the article, he had twice admitted that shortly before the crime he had looked for someone to break into the family home as part of an insurance scam—although there was nothing to indicate that anything had been done in furtherance of any such scam.[762] After the conviction was affirmed, Darlie Routier filed a motion for DNA testing of physical evidence that conceivably could prove that there had been an intruder.[763] The trial court denied the motion,[764] but the Texas Court of Criminal Appeals ordered some of the requested testing,[765] touching off a process that would drag on for years without definitive results.[766]

Appeals, meanwhile, were in abeyance,[767] including a 2005 petition for a federal writ of habeas corpus raising a plethora of issues bearing on Routier's possible innocence—competence of the crime scene investigation, admission of "inflammatory character evidence" at trial, allegedly inaccurate trial testimony by expert witnesses for the prosecution, and effectiveness of trial counsel.[768] Expanding on the issue that *Texas Monthly* had raised, the petition noted that lawyers appointed to represent Routier after her arrest had retained forensic experts whose preliminary analysis indicated that the crime scene had not been staged.[769] Before trial, however, Routier's husband and her mother retained new counsel for her—Douglas Mulder, who had defended them for alleged violations of a gag order regarding the upcoming trial.[770] Mulder had told them that the appointed lawyers planned to implicate Darin Routier in the crime.[771] Mulder promised not to do that[772] and proceeded to trial without any forensic testimony challenging the staged-crime-scene theory.[773]

The petition also challenged the prosecution rendition of the alleged staging of the scene.[774] One piece of physical evidence had been a bloody sock that the prosecution

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[760] Routier v. State, 112 S.W.3d 554, 557–63, 592 (Tex. Crim. App. 2003). Sandra Halsey, the certified court reporter at Routier's trial, was alleged to have made some 18,000 errors in the 6,000-page record. Dallas County v. Halsey, 87 S.W.3d 552, 553 (Tex. 2002).

[761] Skip Hollandsworth, *Maybe Darlie Didn't Do It*, TEX. MONTHLY (July 2002), https://www.texasmonthly.com/articles/maybe-darlie-didnt-do-it/ (last visited May 23, 2019).

[762] *Id.*

[763] Routier v. State, 273 S.W.3d 241, 248–49 (Tex. Crim. App. 2008).

[764] *Id.* at 245.

[765] *Id.* at 256–59.

[766] CTR. FOR HUMAN IDENTIFICATION, UNIV. OF N. TEX., FORENSIC DNA REPORT # 3 (2015) (on file with authors).

[767] Status Report at 6, Routier v. Stephens, SA-05-CA-1156-FB (W.D. Tex. Dec. 10, 2013) (on file with authors). A bloody fingerprint from the coffee table in the room where the murders occurred "is strong evidence that an intruder was present at the time of the attacks." *Id.* at 10.

[768] Petition for Writ of Habeas Corpus at 1, 12–17, 18–19, 24–42, 46–48, Routier v. Dretke, No. F96-39973-J (W.D. Tex. Dec. 9, 2005) (on file with authors). Judicial action on the petition would be stayed pending DNA testing. *Id.* at 23.

[769] *Id.* at 15–16, 29–37.

[770] *Id.* at 16.

[771] *Id.*

[772] *Id.* at 24–25.

[773] *Id.* at 16. In summation, Dallas County Assistant District Attorney Greg Davis told the jury, "It speaks volumes to you sometimes what you don't see and hear." *Id.* at 17.

[774] *Id.* at 10–11.

theorized Routier had planted in an alley seventy-five yards from the home.[775] She would have had to have planted it before stabbing herself, since it contained the blood of both boys, but her blood was not on it or in the vicinity.[776] She made a call to 911 that lasted five minutes and forty-four seconds—presumably after planting the sock.[777] Paramedics arrived a little more than a minute after the call ended, just as Damon Routier took his last breath—which, a state pathologist testified, could have been no more than nine minutes after he had been stabbed.[778] Thus, after stabbing the boys, Routier would have had to have planted the sock, staged the scene inside the house to make it appear that there had been an intruder, and stabbed herself, all in, at most, only slightly more than two minutes—which the petition deemed "physically impossible."[779]

When the appellate process emerges from abeyance, there is a chance, based on the issues raised in the 2005 petition, that the conviction will be reversed and the case remanded for a new trial, leading to dropping of the charges or an acquittal—but as of May 1, 2019, Routier, forty-nine, remained one of six women under death sentences in Texas.[780]

20. Corey Dewayne Williams—Louisiana

Twenty-three-year-old Jarvis Griffin was robbed and shot to death while delivering a pizza in the Queensborough neighborhood of Shreveport on January 4, 1998.[781] The next morning, after an all-night interrogation, sixteen-year-old Corey Dewayne Williams, who had an IQ of sixty-eight, confessed to the crime.[782] Based primarily on the confession, he was convicted by a Caddo Parish jury and sentenced to death on October 28, 2000[783]—two years before the U.S. Supreme Court banned the death penalty for defendants with intellectual disabilities[784] and, three years after that, for defendants who committed murders before the age of eighteen.[785]

On the night of the crime, Williams joined a group of teenagers and young adults outside the home of Renee Iverson, who had ordered a pizza.[786] Among the group were

[775] *Id.*
[776] *Id.*
[777] *Id.*
[778] *Id.*
[779] *Id.* at 11.
[780] The other women on death row were Kimberly Cargill, 52, convicted in 2012 of killing a witness against her in a child-protective case; Linda Carty, 60, convicted in 2002 of abducting and murdering a woman; Brittany Marlowe Holberg, 45, convicted in 1998 of murdering an eighty-year-old man during a robbery of his home; Melissa Elizabeth Lucio, 50, convicted in 2008 of murdering her daughter; and Erica Yvonne Sheppard, 45, convicted in 1995 of murdering a Houston woman. *See* Jolie Mccullough & Ben Hasson, *Faces of Death Row*, TEXAS TRIB., https://apps.texastribune.org/death-row/ (last updated Apr. 8, 2019).
[781] State v. Williams, 831 So. 2d 835, 840 (La. 2002), *superseded by statute as recognized in* Brumfield v. Cain, 135 S. Ct. 2269 (2015).
[782] Williams gave two statements on January 5, 1998. In the second statement, at about 8:30 AM, he confessed that he shot Griffin. In the first, shortly before 6:00 AM, he attributed the murder to Gabriel Logan. *Williams*, 831 So. 2d at 839, 841 (listing Williams's IQ at 68 and describing his confessions).
[783] *Id.* at 83; State v. Williams, at 1, No. 193,258 (La. 1st Jud. Dist. Ct., Caddo Par. Nov. 4, 2015) (on file with authors).
[784] Atkins v. Virginia, 536 U.S. 304, 321 (2002).
[785] Roper v. Simmons, 543 U.S. 551, 575 (2005).
[786] *Williams*, 831 So. 2d at 840.

Iverson's twenty-old-year-old boyfriend, Nathan Logan, his sixteen-year-old brother, Gabriel Logan, and twenty-year-old Chris Moore.[787] When Griffin arrived with the pizza, Iverson paid him and he returned to his car, where he was shot—by, it would be alleged, Williams.[788] The car rolled down the street, veering into a porch, where, according to witnesses, Gabriel Logan took a bank bag and a pizza from the car before fleeing with Moore; they put the bag and pizza box into a dumpster, from which the items were recovered.[789] Nathan Logan claimed that Williams had hidden the murder weapon—a .25-caliber semi-automatic pistol—in a barbecue pit, where Nathan and his brother, Gabriel, retrieved and cleaned it before hiding it in another location.[790]

After motions to suppress the confession as involuntary were denied, the trial opened on October 23, 2000, before Caddo Parish District Judge Scott J. Crichton, a former prosecutor who years later would ascend to the Louisiana Supreme Court.[791] The prosecutor was Hugo Holland, who dispatched ten men to death row, more than any other prosecutor in the state, although half of those defendants' sentences were overturned and none of the defendants was executed.[792] The primary evidence linking Williams to the crime, other than his confessions, was the testimony of Chris Moore, who told the jury that he had seen Williams shoot Griffin.[793] No physical evidence linked Williams to the crime, but Nathan Logan's fingerprint had been found on an empty clip in the recovered pistol and Griffin's blood had been found on Gabriel Logan's clothing.[794] Williams's lawyer argued that Moore and the Logans likely had killed Griffin and "got together" to pin the crime on Williams.[795] The jury, nonetheless, found Williams guilty and sentenced him to death.[796]

On November 1, 2002, the Louisiana Supreme Court affirmed Williams's conviction, but remanded his case for resentencing in light of the U.S. Supreme Court decision a few months earlier banning the death penalty for the mentally disabled.[797] On

[787] *Id.*
[788] *Id.* at 841.
[789] *Id.* at 840–41.
[790] *Id.* at 840.
[791] *Id.* at 839. For background on Judge Crichton, who was sworn in as a justice of the Louisiana Supreme Court on December 15, 2014, see *Louisiana Supreme Court Justices: Justice Scott J. Crichton*, LA. SUP. CT., https://www.lasc.org/justices/crichton.asp (last visited Mar. 19, 2019).
[792] Radley Balko, *How a Fired Prosecutor Became the Most Powerful Law Enforcement Official in Louisiana*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/11/02/how-a-fired-prosecutor-became-the-most-powerful-law-enforcement-official-in-louisiana/?utm_term=.5f5538e490e8; Jim Mustian, *Meet 'Controversial' Louisiana Prosecutor: An Outspoken Death Penalty Champion with Cat Named After Lee Harvey Oswald*, ADVOC. (June 3 2017, 7:00 PM), https://www.theadvocate.com/baton_rouge/news/courts/article_3647e248-4551-11e7-8019-635640ba6b05.html.
[793] *Williams*, 831 So. 2d at 849.
[794] *Id.* at 841; Petition for Writ of Certiorari to the Supreme Court of Louisiana at 7–8, Williams v. State, No. 17-1241 (U.S. Mar. 2, 2018), https://www.supremecourt.gov/DocketPDF/17/17-1241/37353/20180302123056168_17-_Petition.pdf (last visited May 23, 2019)
[795] *Williams*, 831 So. 2d at 841; Petition for Writ of Certiorari, *supra* note 794, at 9.
[796] *Williams*, 831 So. 2d at 839.
[797] *Id.* at 838, 857; *see also* Atkins v. Virginia, 536 U.S. 304 (2002) (banning the death penalty for the mentally disabled).

remand, Crichton sentenced Williams to life in prison on February 20, 2004.[798] Williams's lawyers filed an application for post-conviction relief in Caddo Parish District Court on April 5, 2005.[799] Over the ensuing decade, supplemental pleadings were filed, the final one on January 13, 2015,[800] leading to the belated disclosure of evidence exposing what G. Ben Cohen, one of Williams's appellate lawyers, termed "a toxic combination of hubris, deceit, and indifference" by Hugo Holland.[801]

The belatedly surrendered evidence included an electronic recording of a police interview hours after the crime with Nathan Logan, who proclaimed, based on what he had seen, that the murder "had to" have been committed by his brother, Gabriel Logan, and that "it don't make any sense" to say that Williams had committed it.[802] Not only had the recording been withheld, but before the trial the defense had been given a summary of the interview falsely stating, "Nathan thought that Corey shot the man."[803] Another suppressed recording from the night of the murder was a police interview with a witness named Patrick Anthony, who reported that, before the murder, he had seen Nathan Logan give the murder weapon to Chris Moore and, after the murder he, Anthony, helped Moore and the Logans hide the same weapon where police recovered it.[804]

The prosecution conceded that the recorded statements and other exculpatory evidence had been withheld from Williams's trial lawyers, but asserted that the evidence had been immaterial under the U.S. Supreme Court's decision in *Brady v. Maryland* because Williams had confessed and, therefore, the suppressed evidence would not have changed the outcome of the trial[805]—an argument that the post-conviction judge, Katherine Clark Dorroh, credited in denying relief to Williams on November 4, 2015.[806]

On March 26, 2018, Blythe Taplin, of the New Orleans Promise of Justice Initiative, and Amir H. Ali, of the Roderick & Solange Justice Center in Washington, D.C., petitioned the U.S. Supreme Court for certiorari on Williams's behalf, arguing, "The record in this case epitomizes the dangers of allowing prosecutors to . . . suppress exculpatory evidence based upon their pretrial assessment of what would be 'material' to the defense."[807] Forty-four former high-level U.S. Justice Department lawyers and U.S. attorneys from around the country joined in an amicus brief urging the Supreme Court to "grant review and reverse the judgment in this case, as the favorable information not disclosed by prosecutors, considered cumulatively, puts this case 'in such a different light as to undermine confidence in the verdict.'"[808]

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[798] Ruling on Issue of Mental Retardation at 1, State v. Williams, No. 193,258 (La. 1st Jud. Dist. Ct., Caddo Par., Feb. 20, 2004) (on file with authors).
[799] State v. Williams, at 1, No. 193,258 (La. 1st Jud. Dist. Ct., Caddo Par. Nov. 4, 2015) (on file with authors).
[800] The final Williams pleading at the post-conviction stage was filed on January 13, 2005. *Id.* at 2.
[801] Jessica Pishko, *How Prosecutors Ruined the Life of Corey Williams*, NATION (June 4, 2018), https://www.thenation.com/article/prosecutors-ruined-life-corey-williams/.
[802] Petition for Writ of Certiorari, *supra* note 794, at 12.
[803] *Id.* at 13.
[804] *Id.* at 13–14.
[805] *Id.* at 19; *see generally* Brady v. Maryland, 373 U.S. 83 (1963).
[806] Williams v. State, at 5, No. 193,258 (La. 1st Jud. Dist. Ct., Caddo Par. Nov. 4, 2015) (on file with authors).
[807] Petition for Writ of Certiorari, *supra* note 794, at 34.
[808] Brief of Amici Curiae Former Prosecutors and Dep't of Justice Officials in Support of Petitioner at 6, Williams v. Louisiana, No. 17-1241 (U.S. Apr. 5, 2018).

On May 21, 2018, with the petition for certiorari pending, Caddo Parish District Attorney James E. Stewart, Sr. and Williams's lawyers filed a joint motion before Judge Dorroh asking that Williams's conviction and sentence be vacated, with the understanding that he would plead guilty to manslaughter and obstruction of justice in exchange for immediate release.[809] Dorroh granted the motion, accepted the plea, and ordered Williams released.[810]

The next day, Williams, thirty-six, walked free—but, of course, not exonerated—twenty years, four months, and eighteen days after his arrest for a crime for which it had been doubtful from the beginning that he had committed.[811] In pleading guilty to the lesser charges, Williams waived any right to pursue civil damages for his wrongful conviction, but Amir Ali told a reporter, "This was an impossible deal for Corey to turn down. I think, given the circumstances, it was the best possible outcome for Corey."[812]

21. Marcellus S. Williams—Missouri

Felicia Anne Gayle's body was found by her husband, Dr. Daniel Picus, a St. Louis radiologist, in their suburban University City home on August 11, 1998.[813] Gayle, a forty-two-year-old former *St. Louis Post-Dispatch* reporter,[814] had been stabbed forty-three times with a butcher knife that the killer found in the home.[815]

The case had grown cold when, fifteen months later, St. Louis County Prosecuting Attorney Robert P. McCulloch announced that Marcellus S. Williams, a thirty-year-old burglar and armed robber, had been charged with the crime.[816] The recovery of a laptop

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[809] Joint Motion for Post-Conviction Relief at 1–2, Williams v. Vannoy, No. 193,258, (La. 1st Jud. Dist. Ct., Caddo Par., May 21, 2018) (on file with authors). Amid accusations of racial bias in the district attorney's office, Stewart was elected Caddo Parish's first African American district attorney in 2015 after a hard-fought campaign during which he promised "to bring professionalism and ethics back to the district attorney's office." Alexandria Burris, *Stewart Wins Caddo DA Race*, SHREVEPORT TIMES, https://www.shreveporttimes.com/story/news/election/2015/11/21/caddo-da-election-runoff-results/75899240/ (last updated Nov. 22, 2015).

[810] Andrew Cohen, *Corey Williams About to Walk Free in Louisiana*, MARSHALL PROJECT (May 21, 2018), https://www.themarshallproject.org/2018/05/21/corey-williams-about-to-walk-free-in-louisiana. The Marshall Project earlier had published an account of the case, stating that it presented the Supreme Court with a seemingly "irresistible constellation of issues"—including police interrogation of an intellectually disabled teenager and prosecutorial misconduct—"during the reign of Hugo Holland, a prosecutor known for taking shortcuts in pursuing the death penalty." Andrew Cohen, *Is There Such a Thing As a Slam Dunk? The Corey Williams Case Comes Close*, MARSHALL PROJECT (Apr. 16, 2018), https://www.themarshallproject.org/2018/04/16/is-there-such-a-thing-as-a-slam-dunk.

[811] Pishko, *supra* note 801. Among exculpatory materials released during post-conviction proceedings were electronically recorded statements of investigating officers indicating that, until they obtained Williams's confession, they suspected that the older men were falsely accusing him. "It sounds like to me y'all all decided y'all going to blame it on Corey," one officer told other suspects. "That's exactly what I'm getting." Petition for Writ of Certiorari, *supra* note 794, at 15–16.

[812] Mark Berman, *He Was 16 When Louisiana Charged Him with Murder. Two Decades Later, He's Free*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/05/22/he-was-16-when-louisiana-charged-him-with-murder-two-decades-later-hes-free/?utm_term=.8b710e8abfdf.

[813] Deborah Peterson & Lance Williams, *Police Check Out Leads in Slaying of Former Post-Dispatch Reporter*, ST. LOUIS POST-DISPATCH, Aug. 13, 1998, at B3.

[814] *Id.*

[815] Williams v. Roper, 695 F.3d 825, 832 (8th Cir. 2012).

[816] William C. Lhotka, *Man Charged in Slaying of Former Reporter Has Long Criminal Record*, ST. LOUIS POST-DISPATCH, Nov. 30, 1999, at B1. Williams was born on December, 30, 1968. *See Current Inmates*,

computer and other items taken in the burglary led to the charges, McCulloch said, and the *Post-Dispatch* quoted sources as saying that two informants had provided information to authorities.[817]

The trial of the racially charged case—black defendant, white victim—opened on June 4, 2001, before a St. Louis County jury of eleven white jurors and one black juror after the prosecution exercised peremptory challenges to eliminate six of seven qualified black potential jurors from the panel.[818] Eleven days later, the jury convicted Williams of first-degree murder, burglary, robbery, and armed criminal action.[819] On June 19, the jury recommended a death sentence,[820] which Judge Emmett M. O'Brien imposed on August 27.[821]

The conviction rested mainly on the testimony of Williams's former girlfriend, Laura Asaro, and a jailhouse informant, Henry Cole, both of whom claimed that Williams had admitted the crime.[822] Asaro claimed to have seen a purse containing Gayle's state identification card in the trunk of the car Williams was said to have used in the crime,[823] and police claimed to have found a ruler and a calculator that belonged to Gayle in the car.[824]

Asaro, a crack addict and prostitute, agreed to testify in exchange for the dismissal of outstanding warrants against her.[825] She and Cole, a career criminal with a history of mental illness, also stood to share in a $10,000 reward offered by Gayle's family.[826] A third witness, Glenn Roberts, testified that Williams had sold him a laptop computer taken in the burglary.[827] Roberts would have added that Williams said he was selling the computer for Asaro, but Judge O'Brien barred that proffered assertion as hearsay.[828] Hairs recovered from Gayle's shirt and from a recently cleaned rug on which her body was found had not come from Williams, Gayle, or her husband.[829] Nor had blood and skin recovered from Gayle's fingernails come from Williams.[830] Bloody footprints at the scene matched the shoe size of neither Williams nor first-responders.[831]

The jury, with its lone African American member, deliberated less than two hours before finding Williams guilty and, four days later, deliberated for less than ninety minutes before recommending the death sentence, which Judge O'Brien imposed.[832] The

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MO. DEATH ROW, https://test-missourideathrowcom.pantheonsite.io/current-inmates/ (last updated Mar. 26, 2014).

[817] Lhotka, *supra* note 816.

[818] Petition for a Writ of Habeas Corpus at 9, Williams v. Roper, No. 4:05CV01474RWS (E.D. Mo.2006) (citing trial transcript) (on file with authors).

[819] William C. Lhotka, *Jury Votes Death Penalty for Woman's Murderer*, ST. LOUIS POST-DISPATCH, June 20, 2001, at B1.

[820] *Id.*

[821] *Id.*

[822] State v. Williams, 97 S.W.3d 462, 466–67 (Mo. 2003).

[823] *Id.* at 467.

[824] Williams v. Roper, 695 F.3d 825, 828 (8th Cir. 2012).

[825] Petition for a Writ of Habeas Corpus, s*upra* note 818, at 2–3, 9–10, 17–18.

[826] *Id.* at 97–99; *see also* Williams v. State, 168 S.W.3d 433, 441 (Mo. 2005).

[827] *Williams*, 97 S.W.3d 462 at 467.

[828] *Id.*

[829] Petition for a Writ of Habeas Corpus, *supra* note 818, at 10.

[830] *Id.*

[831] *Id.*

[832] Williams v. Roper, 695 F.3d 825, 828 (8th Cir. 2012).

Missouri Supreme Court unanimously affirmed the conviction both on direct appeal and on a motion for post-conviction relief alleging ineffective assistance of counsel and prosecutorial misconduct.[833] The prosecutorial misconduct allegations included offering to help two prospective witnesses with pending prosecutions, although the witnesses wound up not testifying.[834] The alleged ineffective assistance of counsel included failing to investigate proffered testimony from Asaro's mother that the car Williams supposedly used in the crime had been inoperable at the time.[835] Regarding the ruler and calculator that police claimed to have found in the car, Williams's post-conviction counsel noted that Asaro or the police could have planted the items.[836]

Williams next sought a federal writ of habeas corpus, citing various grounds for overturning his conviction or, at least, his death sentence.[837] In 2010, a federal judge rejected the claims pertaining to the conviction, including a claim of innocence,[838] but vacated Williams's death sentence on the ground that trial counsel had failed to investigate and present social and medical-history evidence during the penalty phase of the trial.[839] Among facts that would have been uncovered via diligent investigation, the judge found, were that as a child Williams had been physically and sexually abused, that his family had condoned criminal behavior, and that he had been exposed to guns, drugs, and alcohol at a young age[840]—facts that the judge found, if known to Williams's jury, would have established "a reasonable probability that the outcome of the penalty phase would have been different."[841]

The U.S. Court of Appeals reinstated Williams's death sentence, saying that presenting evidence of childhood abuse in mitigation would have undermined trial counsel's portrayal of Williams as a "family man, who is innocent of such a violent murder."[842] Williams, said the appellate court, "cannot now plead ineffective assistance alleging that a different strategy would have worked better."[843] Williams's execution was set for January 28, 2015,[844] but it was stayed by the Missouri Supreme Court, which ordered DNA testing[845] that conclusively excluded Williams as the source of DNA on the

[833] *Williams*, 97 S.W.3d at 466; *see also* Williams v. State, 168 S.W.3d 433, 439–45 (Mo. 2005).
[834] *Williams*, 168 S.W.3d at 440.
[835] *Id.* at 442.
[836] Explanations consistent with Williams's innocence include that the police could have planted the items, or that the police could have provided the items to Asaro, or that the actual killer could have provided the items to her without the knowledge of the police. E-mail from Tricia Bushnell, one of Williams's appellate attorneys, to author (Jan. 30, 2019, 17:05 EST) (on file with authors). Asaro had access to the car. In the Matter of Marcellus Williams, Request to Appoint an Independent Board of Inquiry at 1 (Aug. 8, 2017) (on file with authors).
[837] Petition for a Writ of Habeas Corpus, *supra* note 818, at 15–114.
[838] Williams v. Roper, No. 4:05CV1474 RWS, 2010 U.S. Dist. LEXIS 144919, at *13–39, *49–69 (E.D. Mo. Mar. 26, 2010).
[839] *Id.* at *38–49.
[840] *Id.* at *40.
[841] *Id.* at *47.
[842] Williams v. Roper, 695 F.3d 825, 829 (8th Cir. 2012).
[843] *Id.* at 834.
[844] Williams v. McCulloch, 4:15CV00070 RWS, 2015 WL 222170, at *1 (E.D. Mo. Jan. 14, 2015).
[845] Mo. Sup. Ct. Order SC94720, State *ex rel.* Williams v. Steele (Jan. 28, 2015).

murder weapon.[846] Nonetheless, the Missouri Supreme Court denied relief[847] and the U.S. Supreme Court declined to review the case.[848]

The execution was rescheduled for August 22, 2017,[849] but, hours before it was to be carried out, it was stayed by Governor Eric Greitens to permit further investigation of the DNA evidence by a board he appointed for that purpose.[850] If the results of the investigation were favorable to Williams, Greitens indicated he would grant clemency[851]—but, before the board began delving into the case, Greitens, a Republican who had campaigned on a promise to fight corruption, abruptly resigned on May 29, 2018, in the wake of a scandal involving campaign finances and an extra-marital affair.[852] In February 2019, Williams, at age fifty, more than nineteen years after his arrest for the Gayle murder, remained on Missouri death row.[853]

22. Larry Ray Swearingen—Texas

On January 2, 1999, twenty-five days after nineteen-year-old Melissa Aline Trotter was last seen alive in the Lone Star College library in Conroe, she was found dead, a ligature around her neck, in Sam Houston National Forest.[854] Twenty-seven-year-old Larry Ray Swearingen was a suspect because he had met Trotter on the afternoon of December 8 at the college library and they had left together, after which her car had been found in the library parking lot.[855] Swearingen was arrested on several outstanding warrants on December 11, 1998, and was in the Montgomery County Jail when hunters found Trotter's body.[856]

Swearingen denied the crime, but was indicted within days.[857] His trial opened before Judge Fred Edwards and a jury in Montgomery County District Court on June 14,

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[846] Petition for a Writ of Habeas Corpus at 2, Williams v. Larkin, No. SC96625, (Mo. Aug. 14, 2017) (on file with authors).
[847] State *ex rel.* Williams v. Steele, 2017 Mo. Unpub LEXIS 47, at *1 (Nov. 28, 2017).
[848] Williams v. Steele, 137 S. Ct. 2307 (2017).
[849] Tony Rizzo, *Execution Set for Man Convicted of Killing Former St. Louis Newspaper Reporter*, K.C. STAR, http://www.kansascity.com/news/local/crime/article146876134.html (last updated Apr. 26, 2017).
[850] Mark Berman & Wesley Lowery, *Missouri Governor Stays Execution of Marcellus Williams, Says Officials Will Probe DNA Evidence in the Case*, WASH. POST (Aug. 22, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/08/22/missouri-plans-to-execute-marcellus-williams-as-his-attorneys-say-dna-evidence-exonerates-him/?utm_term=.7ee10fc48de4 (last visited May 26, 2019)
[851] *Id.*
[852] Jack Suntrup & Kurt Erickson, *Embattled Missouri Gov. Eric Greitens Resigns; Prosecutor Drops Computer Tampering Charge*, ST. LOUIS POST-DISPATCH, May 30, 2018, at A1.
[853] *Current Inmates*, *supra* note 816.
[854] Swearingen v. State, 101 S.W.3d 89, 93 (Tex. Crim. App. 2003) (en banc); Alex Hannaford, *Is Larry Swearingen Innocent?*, TEX. OBSERVER (Nov. 27, 2012), https://www.texasobserver.org/is-larry-swearingen-innocent/. Trotter was born on November 26, 1979. *Melissa Aline Trotter*, FIND A GRAVE, https://www.findagrave.com/memorial/6166138/melissa-aline-trotter (last visited Mar. 28, 2019).
[855] *Swearingen*, 101 S.W.3d at 93. Swearingen was born on May 21, 1971.*Offender Information: Larry Ray Swearingen*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_info/swearingenlarry.html (last visited May 23, 2019).
[856] *Swearingen*, 101 S.W.3d 89 at 93; Jerry Urban, *Body Found in Forest ID'd as Student, 19*, HOUS. CHRON., Jan. 4, 1999, at A1; Hannaford, *supra* note 854.
[857] Harvey Rice, *Jury to Be Selected in Swearingen Trial*, HOUS. CHRON., May 15, 2000, at A14.

2000.[858] The prosecution, led by Assistant District Attorney Michael R. Tiffin,[859] alleged that Swearingen strangled Trotter to death with a ligature torn or cut from her pantyhose after she rejected his sexual advances—and that he disposed of her body in the forest the same afternoon.[860] Dr. Joye M. Carter, who performed the autopsy, testified that the decomposition of the body was consistent with it having been in the forest for twenty-five days.[861] Cell phone records indicated that Swearingen had placed a call from the vicinity of the forest at 4:25 P.M. on December 8.[862]

Physical evidence purporting to link Swearingen to the crime included a piece of pantyhose said to have been found outside his trailer home by his landlord four days after Trotter's body was discovered—the partial garment matched the ligature with which Trotter had been slain—but police had twice previously searched the trailer without finding it.[863] Hairs said to be similar to Trotter's hair were found in Swearingen's truck, and fibers that might have come from Swearingen's jacket, truck, and trailer were found on Trotter's body,[864] but DNA testing positively excluded Swearingen as the source of male blood flakes found in scrapings of Trotter's fingernails.[865] A cellmate of Swearingen's testified that, when asked if he had committed the crime, Swearingen responded, "F---, yeah, I did it."[866] Swearingen took the stand to proclaim his innocence, testifying that on December 8 he had left Trotter in the company of another man and gone to visit his grandmother, who testified that he had picked her up at 2:30 P.M. and taken her to the post office.[867]

On June 28, 2000, the jury found Swearingen guilty of murder, and eight days later returned findings qualifying him for a death sentence, which Judge Edwards imposed on July 11.[868] In March 2003, on direct appeal, the Texas Court of Criminal Appeals affirmed the verdict and death sentence.[869] Two months later, the court denied a state writ of habeas corpus, which Swearingen had sought while the direct appeal was pending.[870] In May 2004, Swearingen sought a federal writ of habeas corpus, but his petition was dismissed in September 2005 by U.S. District Court Judge Melinda Harmon,[871] whose decision was affirmed by the U.S. Court of Appeals for the Firth Circuit in July 2006.[872]

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[858] State v. Swearingen, No. 99-11-06435-CR, 2000 WL 35627000 (Montgomery Cty. Dist. Ct. July 11, 2000) (trial judge's imposition of death sentence and description of the case chronology up to that point).
[859] *Id.* at *1.
[860] *Swearingen*, 101 S.W.3d 89 at 95.
[861] *Id.* at 93; Second Petition for a Writ of Habeas Corpus, Apx. 1, at 1, Swearingen v. Quarterman, TXSD No. 4:09-cv-00300 (S.D. Tex. Jan. 30, 2009) (affidavit of Joye M. Carter, former Harris County medical examiner) (on file with authors).
[862] *Id.* at 10.
[863] *Id.*
[864] *Swearingen*, 101 S.W.3d at 94.
[865] Second Petition for a Writ of Habeas Corpus, *supra* note 861, at 19.
[866] *Id.* at 5 n.1.
[867] *Id.* at 98.
[868] State v. Swearingen, No. 99-11-06435-CR, 2000 WL 35627000, at *2–4 (Montgomery Cty. Dist. Ct. July 11, 2000).
[869] *Swearingen*, 101 S.W.3d at 101.
[870] *Ex parte* Swearingen, No. WR-53, 613-04 (Tex. Crim. App. May 21, 2003).
[871] Swearingen v. Dretke, No. 04-cv-2058, at 1 (S.D. Tex. Sept. 8, 2005) (cited in Swearingen v. Dretke, 2006 U.S. Dist. LEXIS 32933, at *1 (S.D. Tex. May 24, 2006)).
[872] Swearingen v. Quarterman, 192 F. App'x 300, 301 (5th Cir. 2006) (per curiam).

Swearingen sought DNA testing to no avail[873] and twice came within one day of execution—in January 2007 and January 2009—before being granted stays.[874]

On January 30, 2009, Swearingen's appellate lawyers, Philip H. Hilder and James G. Rytting, filed a second petition for a federal writ of habeas corpus citing seemingly incontrovertible evidence of Swearingen's innocence[875]—that, in the opinion of five independent forensic experts, Trotter's body could not have been left in the forest until about December 18, 1998, more than a week after Swearingen's arrest, and probably had not been left there until two or three days before the hunters found it on January 2, 1999.[876] In light of the forensic opinions, Dr. Carter, recanted her claim at Swearingen's trial that the decomposition of Trotter's body had been consistent with the prosecution theory that Trotter had been slain on December 8.[877]

Hilder and Rytting also developed evidence that days before Trotter disappeared, she had received life-threatening telephone calls that caused her to break down in tears.[878] Her co-workers—she had a telemarketing job—reported the threats to police, who determined that the threats could not have come from Swearingen, but that information was not disclosed to Swearingen's trial counsel, Jerald Crow, in apparent violation of *Brady v. Maryland.*[879] In addition, the second habeas petition alleged that Swearingen had been deprived of effective assistance of counsel by Crow's failure to investigate evidence suggesting that Swearingen had been in jail when the murder occurred.[880]

Based on the Anti-Terrorism and Effect Death Penalty Act, which severely limits state prisoners' ability to bring successive habeas actions,[881] Judge Harmon dismissed the petition in November 2009.[882] The New York-based Innocence Project and the Innocence Network, an umbrella organization of fifty-eight law school innocence projects, filed an amicus brief urging the Fifth Circuit to reverse Harmon on the ground that Swearingen had been incarcerated when Trotter died and therefore could not have murdered her.[883] In April 2011, however, the Fifth Circuit again affirmed Harmon.[884] Five months later, the Texas Legislature, at the behest of the Innocence Project, amended the state law

[873] Motion for Appointment of Counsel at 1, Swearingen v. Dretke, No. 4:06-mc-00059 (S.D. Tex. Feb. 13, 2006) (on file with authors).
[874] Renée C. Lee, *Inmate Avoids Death Again*, HOUS. CHRON., Jan. 27, 2009, at A1.
[875] Second Petition for a Writ of Habeas Corpus, *supra* note 861, at 3.
[876] *Id.* at 11–12. The experts were forensic entomologists Dr. Dael Morris and Dr. James Arends, forensic pathologists Dr. Lloyd White and Dr. Glenn Larkin, and Harris County Medical Examiner Dr. Luis Sanchez. *Id.* at 5.
[877] Second Petition for a Writ of Habeas Corpus, *supra* note 861, Apx. 1, at 2 (affidavit of Joye M. Carter, former Harris County medical examiner) ("[F]indings pursuant to the internal examination [of the body] are consistent with a late exposure in the Sam Houston National Forest within fourteen days of discovery.").
[878] Second Petition for a Writ of Habeas Corpus, *supra* note 861, at 19–20.
[879] *Id.* at 20; State v. Swearingen, No. 99-11-06435-CR, 2000 WL 35627000, at *1 (Montgomery Cty. Dist. Ct. July 11, 2000) (identifying Crow as trial counsel); *see also* Brady v. Maryland, 373 U.S. 83 (1963).
[880] Second Petition for a Writ of Habeas Corpus, *supra* note 861, at 2. The decomposition of the body had been so minimal that the hunters who found it thought it was a mannequin. *Id.* at 7 (citing police report).
[881] 28 U.S.C. § 2244(b) (2012).
[882] Swearingen v. Thaler, No. H-09-300, 2009 WL 4433221, at *1 (S.D. Tex. Nov. 18, 2009) ("Swearingen has not met the AEDPA's requirements for filing a successive petition.").
[883] Brief of Innocence Project & Innocence Network as Amici Curiae at 13, 15, Swearingen v. Thaler, No. 09-70036 (5th Cir. Apr. 26, 2010) (on file with authors).
[884] Swearingen v. Thaler, 421 F. App'x 413, 414 (5th Cir. 2011) (per curiam).

governing DNA testing to address some of the reasons Swearingen's efforts to obtain further DNA testing had been denied,[885] but as of May 1, 2019, Swearingen, forty-seven, remained on death row.[886]

23. Kimber Edwards—Missouri

Thirty-five-year-old Kimberly Cantrell was found shot to death in her apartment in the St. Louis suburb of University City on August 23, 2000.[887] Canvassing the neighborhood, police interviewed two neighbor boys: brothers Christopher Harrington, a ninth grader, who said he had seen a black man carrying a black backpack knocking on Cantrell's door late the afternoon of August 22 and Brandon Harrington, twelve, who said he had heard shots and a woman scream at around 5:15 or 5:30 that afternoon.[888]

Cantrell's ex-husband, thirty-six-year-old Kimber Edwards, was an immediate suspect.[889] The couple had divorced a decade earlier, but in March 2000, Edwards had been charged with failing to make a dozen monthly child-support payments.[890] Edwards, who had a fourteen-year-old daughter with Cantrell, had remarried and was living with his wife and their two daughters in St. Louis, where he was a correctional officer at the city jail.[891] The day after Cantrell's body was found, Edwards told police that he had returned from out of town on August 22, when he had taken his daughters to medical appointments, and then had done some repairs at a rental property he owned in St. Louis.[892] He said he had not seen Cantrell since August 10.[893] Edwards's second wife, Jada Edwards, was interrogated for more than an hour, during which police took her fingerprints, shoeprints, and hair samples as Edwards watched.[894]

On August 25, when police went to the Edwards's rental property to check his alibi, they met a tenant—thirty-nine-year-old Orthell M. Wilson—who fit the description of the man Christopher Harrington had reported seeing three days earlier.[895] Police found a black backpack in Wilson's apartment, and Harrington identified him from a photograph.[896] In a series of shifting statements, Wilson implicated Edwards in the

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[885] TEX. CODE CRIM. PROC. ANN. art. 64.01(a)(1), 64.01(b) (West 2017). The amendments were specifically designed to permit DNA testing of the sort sought by Swearingen. *Testimony of Stephen Saloom, Innocence Project Policy Director, Before the Tex. Sen. Criminal Justice Comm*., at 5 (Mar. 22, 2011), and *Before the Tex. H. Criminal Jurisprudence Comm*., at 5 (May 10, 2011) (on file with authors).

[886] *Death Row Information: Larry Ray Swearingen*, *supra* note 855.

[887] State v. Edwards, 116 S.W.3d 511, 520–21 (Mo. 2003); *Woman Is Found Shot to Death in Her Apartment*, ST. LOUIS POST-DISPATCH, Aug. 25, 2000, at B2.

[888] Edwards v. State, 200 S.W.3d 500, 505 (Mo. 2006); *Edwards*, 116 S.W.3d at 522.

[889] *Edwards*, 116 S.W.3d at 521. According to state inmate records, Edwards was born on March 29, 1964. *Offender Search: Kimber Edwards*, MO. DEP'T OF CORR., https://web.mo.gov/doc/offSearchWeb/offenderInfoAction.do (search results for "Kimber Edwards").

[890] *Edwards*, 116 S.W.3d at 521.

[891] *Id.* at 520–21.

[892] *Id.*

[893] *Id.*

[894] Appellant's Brief & Addendum at 6, Edwards v. Roper, 688 F.3d 449 (8th Cir. 2012) (No. 11-1092) (on file with authors).

[895] *Edwards*, 116 S.W.3d at 522. According to state inmate records, Wilson (whose first name is misspelled "Ortell" in some records) was born on December 18, 1960. *Offender Search: Orthell Wilson*, MO. DEP'T OF CORR., https://web.mo.gov/doc/offSearchWeb/offenderInfoAction.do (search results for "Orthell Wilson").

[896] *Edwards*, 116 S.W.3d at 522.

crime—in the first version, Edwards paid Wilson $500 "to just go knock on [Cantrell's] door and see if she was there or not, and then to leave," in another version, Edwards asked Wilson to "intimidate" Cantrell for $3,500, and, in the final version, Edwards provided the handgun for Wilson to "take her out."[897] On August 26, Wilson led police to a vacant building where they recovered the murder weapon.[898]

The next day, University City Police arrested Edwards, told him that Wilson was in custody, and showed him photographs of the crime scene and murder weapon.[899] Edwards professed innocence, as he had four days earlier, but when told that the investigation would continue, and that it would involve his wife and children, he agreed to make a statement, provided that the police would leave his family alone.[900] He then claimed that a man named Michael had overheard him talking about his child-support problems and offered to take care of the problems for $1,600—a price on which they agreed.[901] When police asked if Michael actually was Wilson, Edwards said that he was not, but that Wilson had demanded a share of the money for helping Michael with "the job."[902]

On the assumption that the Edwards and Wilson statements were sufficient to prove that the former had hired the latter to commit the crime, both were charged with Cantrell's murder.[903] After Wilson pleaded guilty and was sentenced to life in prison, Edwards's trial opened on April 22, 2002, before St. Louis County Circuit Court Judge Mark D. Siegel and an all-white jury—from which the prosecution peremptorily struck three qualified African American potential jurors; Edwards was an African American.[904] Before trial, Edwards moved to suppress his incriminating statement, contending that it was the product of physical and psychological coercion, but Judge Siegel denied the motion.[905]

Wilson was not called to testify at the trial, but his brother, Hughie Wilson, also Edwards's tenant, told the jury that that in the spring or early summer of 2000 Edwards inquired about getting a "throwaway" gun.[906] A few days before the murder, according to Hughie Wilson, he had been with his brother and Edwards in his brother's apartment, where he saw a gun that looked like the murder weapon on a bedroom table.[907] Edwards

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[897] Appellant's Brief at 11–12, Edwards v. State, No. SC 86895 (Mo. Feb. 6, 2006) (on file with authors).
[898] *Id.*
[899] *Edwards*, 116 S.W.3d at 522.
[900] *Id.* at 523.
[901] *Id.*
[902] Appellant's Brief & Addendum, *supra* note 894, at 9.
[903] Appellant's Brief, *supra* note 897, at 49–50.
[904] Appellant's Brief & Addendum, *supra* note 894, at 1, 9; Appellant's Brief, *supra* note 897, at 13. The prosecution claimed that removal of a potential black juror was justified because he had stated that his niece had been treated unfairly by law enforcement, although a white juror who complained about the harshness of his nephew's prison sentence for burglary had been accepted. *See* Editorial Bd., *Too Many Black Men Sent to Death by White Juries*, ST. LOUIS POST-DISPATCH, Apr. 10, 2015, at A14 (quoting a letter to Missouri Governor Jay Nixon signed by "dozens of elected officials, attorneys and death penalty opponents"). Prosecutorial challenges of potential jurors of the same race as the defendant based solely on race violates the Equal Protection Clause of the Fourteenth Amendment. Batson v. Kentucky, 476 U.S. 79, 89 (1986).
[905] *Edwards*, 116 S.W.3d at 523–24.
[906] *Id.* at 523.
[907] *Id.*

took the stand in his own defense, telling the jury that he had made the incriminating statement out of fear that police would accuse his wife of being involved in the crime.[908]

The jury convicted Edwards on April 25, 2002, and, after a brief hearing the next day, found him eligible for a death sentence, which Judge Siegel imposed a day after that.[909] In August 2003, the conviction and sentenced were affirmed by the Missouri Supreme Court,[910] which denied Edwards's petition for post-conviction relief three years later.[911] Edwards next sought a federal writ of habeas corpus,[912] which was denied by the U.S. District Court in October 2009[913] and by the U.S. Court of Appeals for the Fifth Circuit in January 2012.[914]

In June 2015, Edwards's appellate counsel—Kent E. Gibson and Jeremy S. Weis—filed a state petition for a writ of habeas corpus, asserting Edwards's innocence based primarily on a recantation by Orthell Wilson, who alleged that he had been coerced by police to falsely implicate Edwards.[915] The affidavit said that Wilson and Cantrell had been engaged in a secret romantic relationship that began shortly after she and Edwards were divorced, that during the entire relationship Wilson had "a serious drug problem" for which he was "constantly in need of money," that he shot her after a "heated argument" over his drug addiction, and that he had recanted shortly after Edwards was convicted, but no one "followed up on this with me."[916]

Wilson's assertion that he had been romantically involved with Cantrell was corroborated by affidavits from two of Wilson's neighbors and the daughter of a third neighbor attesting that they had seen him hugging and kissing her on various occasions.[917] The petition also cited a psychiatric evaluation conducted during earlier proceedings indicating that Edwards suffered from Asperger's Syndrome, a condition that rendered him vulnerable to pressure to confess to a crime he did not commit.[918]

The Missouri Supreme Court rejected the petition without explanation[919]—which was unsurprising in light of the propensity of courts to summarily dismiss recantations as unreliable, even though experience in the DNA forensic age has established otherwise,[920]

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[908] Appellant's Brief, *supra* note 897, at 5–6.
[909] Appellant's Brief & Addendum, *supra* note 894, at 15–16.
[910] *Edwards*, 116 S.W.3d at 550.
[911] Edwards v. State, 200 S.W.3d 500, 521 (Mo. 2006) (en banc)
[912] Appellant's Brief & Addendum, *supra* note 894, at 22.
[913] Edwards v. Roper, No. 4:06-CV-1419, 2009 WL 3164112, at *25 (E.D. Mo. Sept. 28, 2009), *aff'd*, 688 F.3d 449 (8th Cir. 2012).
[914] *Edwards*, 688 F.3d at 463.
[915] Petition for a Writ of Habeas Corpus at 2, 8, 15–17, 22–24, 37, Edwards v. Griffith (Mo. June 1, 2015) (on file with authors); *id.*, Ex. 1, at 1–2 (affidavit of Orthell Wilson).
[916] Petition for a Writ of Habeas Corpus, *supra* note 915, Ex. 1, at ¶¶ 4–5, 7 (affidavit of Orthell Wilson).
[917] *Id.*, Ex. 4, at ¶ 9 (affidavit of Mara Esthelle Robins-Couch); *id.*, Ex. 5, at ¶¶ 6–7 (affidavit of Joyce Harris); *id.*, Ex. 6, at ¶¶ 5–7 (affidavit of Ronyne Jean McKnight).
[918] *Id.* at 4, 6–7; *see also* Psychiatric Evaluation (report by William S. Logan, forensic psychiatrist) at 2–4, Edwards v. State, 4:06-cv-01419-CJE (Mo. Aug. 17, 2007) (on file with authors).
[919] State *ex rel.* Edwards v. Griffith, No. SC 95033, 2015 Mo. Unpub LEXIS 340, at *1 (June 30, 2015).
[920] THE SNITCH SYSTEM, *supra* note 32 at 14. A 2013 study found that, of 250 documented exonerations in U.S. murder cases, 139, or 55.6%, involved at least one recantation. ALEXANDRA E. GROSS & SAMUEL R. GROSS, NAT'L REGISTRY OF EXONERATIONS, WITNESS RECANTATION STUDY: PRELIMINARY FINDINGS 4 (2013), http://www.law.umich.edu/special/exoneration/Documents/RecantationUpdate_5_2013.pdf.

and similarly to look askance at the notion that confessions, absent physical torture, are "damning and compelling evidence of guilt."[921]

Edwards's hope of avoiding execution at that point was slim, but on October 2015, Missouri Governor Jeremiah W. "Jay" Nixon, a staunch proponent of the death penalty who, as attorney general, had fought to preserve Edwards's death sentence,[922] unexpectedly commuted his sentence to life—although purporting to believe that Edwards was guilty.[923] In early 2019, nearing his fifty-fifth birthday and the seventeenth anniversary of his death sentence, Edwards languished in Missouri's South Central Correctional Center.[924]

24. Robert Leslie Roberson III—Texas

On the morning of January 31, 2002, thirty-five-year-old Robert Leslie Roberson III rolled a wheelchair into the Palestine Regional Medical Center emergency room.[925] His girlfriend, Teddie Cox, sat in the wheelchair, holding what nurse Kelly Gurganus thought looked like a rag doll—but was Roberson's limp two-year-old daughter, Nikki Curtis.[926] "She's not breathing," Gurganus quoted Cox as saying.[927]

Noticing bruises on Nikki's body and head, Gurganus asked Roberson what caused them.[928] He said Nikki had fallen out of bed.[929] Finding that explanation implausible in view of the severity of Nikki's injuries, Gurganus asked the nursing supervisor to call police—to whom Roberson reiterated that Nikki had fallen out of bed.[930] Meanwhile, Andrea Sims, a nurse who specialized in sexual assault cases, examined Nikki, finding rectal injuries consistent with sexual assault.[931] Due to swelling in Nikki's brain, Dr. Thomas Konjoyan transferred her to Children's Medical Center in Dallas, where she died of "blunt force head injuries" that, according to Dr. Jill Urban, who performed the autopsy, could have resulted from shaking.[932] Based largely on the fact that Roberson had been alone with Nikki when she presumably suffered her fatal injuries—Teddie Cox had been hospitalized for a hysterectomy[933]—a grand jury indictment was returned on April

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[921] Leo & Ofshe, *supra* note 325. Of 364 U.S. DNA exonerations documented as of late February 2019, 28% involved false confessions. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Mar. 31, 2019).
[922] Respondent's Brief in Opposition to Certiorari at 19, Edwards v. State, No. 06-8534 (Mo. Jan. 29, 2007) (on file with authors).
[923] John Eligon, *Missouri Inmate Is Spared Death Sentence*, N.Y. TIMES, Oct. 3, 2015, at A13.
[924] *Offender Search: Kimber Edwards*, *supra* note 889.
[925] Roberson v. Dir., Tex. Dep't of Crim. Justice-Corr. Insts. Div., No. 2:09cv327, 2014 U.S. Dist. LEXIS 139510, at *3 (E.D. Tex. Aug. 20, 2014). Roberson was born on November 10, 1966. *Death Row Information: Robert Leslie Roberson III*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_info/robersonrobert.html (last visited May 23, 2019).
[926] *Roberson*, 2014 U.S. Dist. LEXIS 139510, at *3.
[927] *Id.*
[928] *Id.* at *3–4.
[929] *Id.* at *3.
[930] *Id.* at *4; *see also* Roberson v. Stephens, 614 F. App'x 124, 126 (5th Cir. 2015) (per curiam).
[931] *Roberson*, 614 F. App'x at 126.
[932] *Id.* at 127–28; *Roberson*, 2014 U.S. Dist. LEXIS 139510, at *5–6.
[933] *Roberson*, 2014 U.S. Dist. LEXIS 139510, at *8.

25 charging Roberson with murder during the commission, or attempted commission, of sexual assault of a child under age six.[934]

At Roberson's jury trial, which opened on February 3, 2003, before Anderson County District Court Judge Bascom W. Bentley III, the prosecution relied principally on medical testimony.[935] Dr. Konjoyan testified that it was "basically impossible" that Nikki's injuries resulted from falling out of bed.[936] Dr. John Ross, who examined Nikki on the day she died, testified that her brain had shifted from the right side to the left and that her injuries had not been accidental.[937] Sims, the nurse who specialized in sexual assault, told the jury that she believed that Nikki had been sexually assaulted,[938] even though Dr. Urban, who performed the autopsy, noted no rectal injuries and detected no semen.[939] Dr. Janet Squires, a pediatrician who treated Nikki at the Dallas center, testified that her death resulted from a "very forceful act," but could not determine whether she had been sexually abused.[940]

In addition to the medical witnesses, the prosecution called Teddie Cox, who testified that while Roberson was in the Anderson County Jail she had asked him if he killed Nikki and he said that he might have "snapped," but had no memory of it.[941] Cox, her ten-year-old daughter, Rachel Cox, and eleven-year-old niece, Courtney Berryhill, all testified that they had seen Roberson shake and spank Nikki.[942] The defense called Cox's sister, Patricia Conklin, who testified the Roberson had a loving relationship with Nikki and that Cox had a poor reputation for truthfulness.[943]

At the close of the evidence, the prosecution dismissed the sexual assault charges for lack of evidence and the defense moved to dismiss the indictment, but Judge Bentley denied the motion.[944] On February 11, the jury found Roberson guilty of what had become a shaken-baby case and, after a hearing on mitigation and aggravation three days later, found him eligible for a death sentence, which Judge Bentley imposed on February 14.[945] The conviction and death sentence were affirmed in June 2007 by the Texas Court of Criminal Appeals,[946] which denied a petition for post-conviction relief in September 2009.[947] In September 2010, Roberson's lawyers petitioned for a federal writ of habeas corpus,[948] which was denied by the U.S. District Court in September 2014[949] and by the U.S. Court of Appeals for the Fifth Circuit in May 2015.[950]

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[934] *Roberson*, 614 F. App'x at 125–26.
[935] *Id.* at 126–27, 129; Petition for Writ of Habeas Corpus at 3, 4, 33, Roberson v. Thaler, 2:09-cv-00327-JRG-RSP, (E.D. Tex. Sept. 4, 2010) (on file with authors).
[936] *Roberson*, 614 F. App'x at 127.
[937] *Id.* at 126–27.
[938] *Id.* at 126.
[939] *Id.* at 127.
[940] Roberson v. Dir., Tex. Dep't of Crim. Justice-Corr. Insts. Div., No. 2:09cv327, 2014 U.S. Dist. LEXIS 139510, at *17 (E.D. Tex. Aug. 20, 2104).
[941] *Id.* at *10.
[942] *Id.* at *6–7.
[943] *Id.* at *10.
[944] Petition for Writ of Habeas Corpus, *supra* note 935, at 45.
[945] *Id.* at 34.
[946] Roberson v. State, No. AP-74,671, 2002 WL 34217382, at *12 (Tex. Crim. App. June 20, 2007).
[947] *Ex parte* Roberson, WR-63, 081-01 & WR-63, 081-02, 2009 WL 2959738, at *1 (Tex. Crim. App. Sept. 16, 2009) (per curiam).
[948] Petition for Writ of Habeas Corpus, *supra* note 935.

On June 8, 2016, thirteen days before Roberson's scheduled execution, appellate counsel he recently had obtained—Benjamin B. Wolff and Gretchen S. Sween, of the Texas Office of Capital and Forensic Writs[951]—moved before the Court of Criminal Appeals for a stay based on new evidence incontrovertibly establishing that "[i]t is impossible to shake a toddler to death without causing serious neck injuries—and Nikki had none."[952] Roberson's conviction, to quote the motion, had rested "on junk science and highly inflammatory sexual-abuse allegations that were false" and in the intervening years there had been "a sea change in the medical consensus" on shaken baby cases.[953]

The motion cited statements by three forensic pathologists—Drs. Harry J. Bonnell, Janice J. Ophoven, and John Plunkett—and a biomechanical engineer—Ken L. Morrison, Ph.D.—who agreed that the theory the prosecution advanced at Roberson's trial about how Nikki died was "unsupported by contemporary medicine or biomechanics."[954] The four experts advanced various possible causes of death consistent with Roberson's innocence: Nikki could have died of undiagnosed meningitis from a middle ear infection, evidenced by the fact that two days before her death she had a 104.5-degree temperature when seen by a doctor; of a congenital condition, evidenced by the facts that her birth had been difficult and she suffered long-standing health issues; of a head injury she sustained before spending the night with her father; or of injuries sustained from a fall of as little as two feet.[955]

On June 16, when Roberson had five days to live, the Court of Criminal Appeals granted the stay and remanded the case to the trial court to resolve his claims that he had been convicted on scientifically invalid testimony, that his right to a fair trial had been violated by false forensic testimony, and that he was innocent of capital murder.[956] More than two and a half years later, in early 2019, the case remained under review in Anderson County, and Roberson, at age fifty-two, passed his sixteenth year on death row.[957]

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[949] Roberson v. Dir., Tex. Dep't of Crim. Justice-Corr. Insts. Div., 2014 U.S. Dist. LEXIS 137986, at *1 (E.D. Tex. Sept. 30, 2014) (adopting recommendation of U.S. Magistrate, Roberson v. Dir., Tex. Dep't of Crim. Justice-Corr. Inst. Div., 2014 U.S. Dist. LEXIS 139510, at *169).

[950] Roberson v. Stephens, 614 F. App'x 124, 125, 136 (5th Cir. 2015) (per curiam).

[951] Motion for Stay of Execution at *9, *Ex parte* Roberson, WR-63, 081-03 (Tex. Crim. App. June 8, 2016) (on file with authors) (filing occurred "as soon as practicable" by "recently obtained conflict-free federal habeas counsel"); *see also* OFF. OF CAP. & FORENSIC WRITS, http://www.ocfw.texas.gov/ (last visited Mar. 21, 2019).

[952] Motion for Stay of Execution, *supra* note 951, at *5.

[953] *Id.* at *3.

[954] *Id.* at *2.

[955] *Id.* at *6–7.

[956] *Ex parte* Roberson, No. WR-63, 081-03, 2016 WL 3543332, at *1 (Tex. Crim. App. June 16, 2016).

[957] *Death Row Information: Robert Leslie Roberson III*, *supra* note 925. For a discussion of the case and shaken-baby syndrome, see Jolie McCullough, *Will a Texas Law that Overturns Convictions Based on Bad Science Save This Death Row Inmate?*, TEX. TRIB. (Aug. 16, 2018), https://www.texastribune.org/2018/08/16/robert-roberson-death-penalty-junk-science-review/.

CONCLUSION

The standard of proof necessary to establish convicted defendants' innocence to the legal system's satisfaction is higher than the standard required to convict them in the first place—an issue of serious concern in capital cases, as the foregoing profiles show.

Consider, for example, the case of Anibal Garcia Rousseau,[958] who was convicted and sentenced to death in Texas for the murder and armed robbery of a federal agent—even though three eyewitnesses testified that Rousseau was not the killer.[959] Shortly after the conviction, which rested solely on the demonstrably inaccurate testimony of a surviving victim of the crime,[960] evidence emerged establishing that the weapon with which the agent had been slain was used in a subsequent murder—a fact that, together with other evidence, left virtually no doubt that both murders had been committed by someone else.[961] Rousseau nonetheless languished on death row for more than fifteen years, until he died while his innocence claim was still being litigated.[962]

Criminal convictions require proof of guilt "beyond a reasonable doubt,"[963] whatever that may mean in the eyes of beholders in jury boxes or judges at bench trials.[964] It is higher than a "preponderance of the evidence," the standard of proof in civil cases—a probability greater than fifty percent. How much higher is anyone's guess, but in practice it has not been high enough to prevent the convictions of:

- Sonia Jacobs,[965] who was sentenced to death in Florida for the murder of two police officers based primarily on the testimony of the probable actual killer, who was unquestionably a liar.[966]
- Tyrone Lee Noling,[967] who was sentenced to die for an Ohio double murder in which he became a suspect because he had stolen a pistol that was suspected of being the murder weapon—but in fact was not—and who was excluded as the source of myriad fingerprints and other evidence related to the crime.[968]
- Darlie Lynn Routier,[969] who was convicted and sentenced to death in Texas for the murder of her five-year-old son based in part on her seemingly odd behavior in the aftermath of the murder—even though during the crime, which she testified had been committed by a knife-wielding home-invader, her carotid artery had been nearly fatally severed.[970]

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[958] *Supra* profile No. 12.
[959] *Supra* note 521 and accompanying text.
[960] *Supra* notes 519–20 and accompanying text.
[961] *Supra* notes 525–28 and accompanying text.
[962] *Supra* note 533 and accompanying text.
[963] *In re* Winship, 397 U.S. 358, 363–64 (1970) ("[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.").
[964] Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication.").
[965] *Supra* profile No. 1.
[966] *Supra* notes 28–29, 39–40 and accompanying text.
[967] *Supra* profile No. 14.
[968] *Supra* notes 587, 594–95 and accompanying text.
[969] *Supra* profile No. 19.
[970] *Supra* notes 754–57 and accompanying text.

And what is the standard for establishing innocence after conviction? As a matter of law, appellate courts view the evidence in criminal cases in the light most favorable to the prosecution[971]—a sacrosanct principle in the extreme, as exemplified by the cases of:

- Dennis Harold Lawley,[972] for whom a corroborated confession by the likely actual killer was insufficient and who died on California death row, his home for more than twenty-two years, while his case languished in litigation.[973]
- Eddie Lee Howard, Jr.,[974] for whom a DNA exclusion and disavowal of highly incriminating bite-mark testimony by a prosecution forensic witness was insufficient in Mississippi.[975]
- Larry Ray Swearingen,[976] for whom evidence that he had been in jail when the murder for which he was sentenced to death in Texas occurred was insufficient, or at least had been as of June 2019.[977]

It has been suggested that the risk of erroneous convictions in capital cases might be alleviated by raising the standard of proof at trial to something higher than beyond a reasonable doubt.[978] Whatever the merits of changing the nomenclature—whether it curtailed erroneous convictions in capital cases,[979] merely reinforced the illusion of jury accuracy already provided by the reasonable-doubt standard,[980] or did something in between—rejections of proposals to raise the standard to "beyond any doubt" in New York,"[981] "no doubt" in Massachusetts,[982] and "beyond all doubt" in Illinois[983] have

[971] "Viewing the evidence in the light most favorable to the government means 'crediting every inference that the jury might have drawn in favor of the government.' " United States v. Persico, 645 F.3d 85, 104 (2d Cir. 2011) (quoting United States v. Temple, 447 F.3d 130, 136–37 (2d Cir. 1999)).

[972] *Supra* profile No. 13.

[973] *Supra* notes 554, 559, 570, 575, 578, 585 and accompanying text.

[974] *Supra* profile No. 16.

[975] *Supra* notes 669–71, 674–76 and accompanying text.

[976] *Supra* profile No. 22.

[977] *Supra* notes 875–77 and accompanying text.

[978] Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death*, 78 CHI.-KENT L. REV. 1359, 1361 (2003) ("We propose that before the government may deprive a defendant of life, it must prove the defendant's guilt by a standard more rigorous than beyond a reasonable doubt.").

[979] Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 74 (2005) (Since "certainty is impossible," proponents of no-doubt standards "seem to be asking that no defendant ever be sentenced to death.").

[980] *Id.* at 66 ("[R]easonable doubt, by appearing to require a great deal of certainty, may ensure that society as a whole accepts guilty verdicts, regardless of whether jurors require such certainty in actuality.").

[981] William Glaberson, *Killer's Lawyers Seek to Raise Standard of Proof for Death Penalty*, N.Y. TIMES, Jan. 11, 2014, at 27 ("[T]he state's Capital Defender Office argues for the first time that . . . [the Court of Criminal Appeals] should require prosecutors to prove a defendant's guilt 'beyond any doubt' to justify an execution."). The Court of Criminal Appeals rejected the argument in *People v. Mateo*, 811 N.E.2d 1053, 1068 n.15 (2004) ("Contrary to defendant's assertions, the reasonable doubt charge here conveyed the proper standard."). Following *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam), New York did not reinstate the death penalty until 1995. Malcolm Gladwell, *After 18 Years, N.Y. Death Penalty Revived*, WASH. POST, Mar. 8, 1995, at A15. In 2004, without any executions having occurred under the law, the Court of Appeals voided the law by vacating a death sentence on the ground that a defective jury-deadlock instruction had been given in the case—a defect that could be cured only by "a new deadlock instruction from the Legislature." People v. LaValle, 817 N.E.2d 341, 344 (N.Y. App. Div. 2004). Ensuing attempts to reinstate the death penalty failed. Rebecca Baker Erwin, *Lawmakers Reject Death Penalty Bill,*

rendered the prospect of such change sufficiently remote that, at least for the time being, it scarcely seems worth considering.

There is, however, a change that is more realistically possible and likely to have greater impact—ending the "death-qualification" of juries for the guilt-innocence phase of capital trials. Until the U.S. Supreme Court decided *Witherspoon v. Illinois*[984] in 1968, prospective jurors who expressed conscientious or religious scruples against the death penalty could be categorically excluded by judges for cause from capital cases.[985] *Witherspoon* held that such a sweeping exclusion resulted in "a tribunal organized to return a death verdict,"[986] but condoned the time-honored exclusion of prospective jurors who said that they would not impose a death sentence, regardless of the evidence.[987]

Death-qualification, thus, has remained part of the jury-selection process in capital cases.[988] The problem is that, while prospective jurors' unwillingness to impose death

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JOURNAL-NEWS (Westchester County, N.Y.), Apr. 13, 2005, at 18. In 2007, the Court of Appeals voided another death sentence on constitutional grounds. People v. Taylor, 878 N.E.2d 969, 971, 984 (2007). In 2008, Governor David Peterson ordered the state's death cell dismantled. Brendan Scott, *Gov. Pulls Switch on Death Cell*, N.Y. POST (July 24, 2008), https://nypost.com/2008/07/24/gov-pulls-switch-on-death-cell/.

[982] JOSEPH L. HOFFMAN ET AL., REPORT OF GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT 22 (2004), https://www.mass.gov/files/documents/2016/08/mr/5-3-04governorsreportcapitalpunishment.pdf [hereinafter Mass. Rpt.] ("[T]he jury should be required [as a prerequisite to a death sentence] to find that there is 'no doubt' about the defendant's guilt of capital murder."). The report was central to an effort by Governor Mitt Romney to reinstate the death penalty. Laura Mansnerus, *States Seek Ways to Make Executions Error Free*, N.Y. TIMES, Nov. 2, 2003, at WK5. Romney's effort was rejected by legislators. AP, *Bill to Restore Death Penalty Fails in Boston*, N.Y. TIMES, Nov. 16, 2005, at A16.

[983] Illinois Governor Bruce Rauner, in an amendatory veto of a gun-control measure, called for reinstatement of the death penalty for mass murderers and killers of law-enforcement officers. Letter from Gov. Bruce Rauner to members of the Illinois legislature ¶ 8 (May 14, 2018) (stating that "the only morally justifiable standard of proof in a death penalty case is 'beyond all doubt' "), http://www.ilga.gov/legislation/fulltext.asp?DocName=10000HB1468gms&GA=100&LegID=101958&SessionId=91&SpecSess=0&DocTypeId=HB&DocNum=1468&GAID=14&Session. The Illinois death penalty was abolished in 2011. *See* Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 LAW & INEQ. 245 (2012).

[984] 391 U.S. 510 (1968).

[985] The Illinois statute challenged in *Witherspoon* provided as follows: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *Id.* at 512 (quoting Ill. Rev. Stat., c. 38, § 743 (1959)). "Cause challenges" are unlimited in quantity and must be based on specified legal grounds, as opposed to "peremptory challenges," which are limited in number, but which attorneys, at the time of *Witherspoon*, could exercise for any reason. *See* Craig Haney, *Juries and the Death Penalty: Readdressing the* Witherspoon *Question*, 26 CRIME & DELINQ. 512, 516 (1980). Eighteen years after *Witherspoon*, the Supreme Court forbade the use of peremptory challenges by prosecutors to exclude jurors of the same race as the defendant based solely on race. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[986] *Witherspoon*, 391 U.S. at 540–41.

[987] *Id.* at 522 n.21 (holding that exclusion of jurors is proper only if "their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt").

[988] Haney, *supra* note 985, at 515. In 1985, the Supreme Court took the "opportunity to clarify" *Witherspoon*, holding that a prospective juror may be excluded for cause when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). In reality, the decision clarified nothing—leaving in place what one student of the law aptly branded "a process riddled with ambiguity." James M. Carr, *At Witt's End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 STAN. L. REV. 427, 429 (1987).

sentences is irrelevant to their ability to fairly decide whether to convict or acquit, there is a strong correlation between attitudes about the death penalty and perceptions about defendants' guilt or innocence.[989] Studies repeatedly have shown that death-qualified jurors are substantially more likely to convict than are jurors excludable under *Witherspoon.*[990] In addition to the inclination to convict stemming from attitudes held going into the jury-qualification process, the process itself is prejudicial, inevitably creating an impression that the major players in the courtroom, including the judge and defense counsel, believe the defendant is guilty.[991]

Since juries prescribe the punishment in capital cases, jurors who would not under any circumstances impose a death sentence of course must be excluded from the penalty phase of the trial, but they do not have to be excluded from the guilt-determination phase. The solution is to have two juries—one for the guilt-innocence phase that is not death-qualified, and one for the penalty phase that is death-qualified. Proponents of the death penalty can be counted upon to object to the costs associated with impaneling two juries. In the scheme of things, however, the cost would be inconsequential.

In 2018, death sentences were imposed in forty-two state and federal cases.[992] The data are sketchy on the numbers of trials in which juries impose death sentences following capital sentencing hearings,[993] but even if only one in three capital trials ends in a death sentence, there would have been fewer than 150 capital sentencing hearings in 2018. Nationally, there are more than 150,000 jury trials annually.[994] If a second jury were impaneled in each of 150 capital cases, the increase in the number of juries would be less than one-tenth of one percent—which would not break the criminal-adjudication bank.

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[989] Claudia L. Cowan, William C. Thompson, Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation,* 8 L. & HUM. BEHAV. 53, 55–59 (1984) (summarizing studies concluding that death qualification results in juries more likely to convict than juries that are not death-qualified); Haney, *supra* note 985, at 520, 525–26.

[990] HANS ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT (1968); Edward Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: A Study of Colorado Veniremen*, 42 COLO. L. REV. 1 (1970); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 53 (1984); George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); Welsh S. White, *Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176 (1973).

[991] Haney, *supra* note 985, at 523.

[992] *Death Sentences in 2018*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/2018-sentencing (last visited May 22, 2018).

[993] DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 233 (1990) (reporting that, in post-*Furman* cases, juries imposed death sentences in 25% of Delaware cases, 36% of Colorado and New Jersey cases, 42% of Maryland cases, 49% of Louisiana cases, 48% of California cases, 50% of North Carolina cases, and 60% of Mississippi cases); Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO L.J. 661, 664 (2017) (reporting the author's finding that a life sentence was imposed in eleven of twenty-one Virginia cases—52%—in which there were capital-sentencing hearings from 2005 through 2015).

[994] HON. GREGORY E. MIZE ET AL., NAT'L CTR. FOR STATE CTS., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS 7 (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx (reporting that, from 2002 through 2006, on average there were an estimated 148,558 state and 5,940 federal jury trials).

A related situation that veritably demands action is racial discrimination in jury selection—an historic wrong that could be remedied most easily by eliminating peremptory challenges.[995] Abuse of the jury-selection system in a racially discriminatory manner is legion.[996] One example of how peremptory challenges are implicated in dubious convictions is the Missouri case of Marcellus S. Williams,[997] an African American at whose capital trial for the murder of a white woman the prosecution exercised peremptory challenges to eliminate six qualified African Americans from the jury.[998] There is a strong and growing consensus among judges and legal scholars that the jury-selection process should be overhauled.[999] Reform, in our view, is long overdue.

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[995] Justice Thurgood Marshall believed that eliminating peremptory challenges was the only way to end "the repugnancy" of racial discrimination in jury selection. Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

[996] *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 456–47 (1996) (surveying reported decisions 1,101 *Batson* claims by criminal defendants between April 30, 1986 and April 30, 1993).

[997] *Supra* profile No. 21.

[998] Petition for a Writ of Habeas Corpus, *supra* note 818, at 4. A more egregious example is the case of Curtis Giovanni Flowers, an African American gospel singer with no criminal record who is on death row in Mississippi for a quadruple murder for which he has been tried six times. David Leonhardt, *The Mississippi Man Tried Six Times for the Same Crime*, N.Y. TIMES, May 21, 2018, at A22; Nathalie Baptiste, *Prosecutors Are Using Jailhouse Snitches to Send Innocent People to Death Row*, MOTHER JONES, (July 9, 2018), https://www.motherjones.com/crime-justice/2018/07/prosecutors-are-using-jailhouse-snitches-to-send-innocent-people-to-death-row/ (last visited May 23, 2019) Curtis appears to have been the repeated victim of racial discrimination in jury selection, having been sentenced to death following four of his six trials at which the prosecutor, Montgomery County District Attorney Doug Evans, exercised peremptory challenges to eliminate most qualified black jurors. Petition for Post-Conviction Relief at 95, 110, Flowers v. State, No. 200300071-CR (Montgomery Cty. Cir. Ct. Mar. 17, 2016) (on file with authors). The first three convictions were reversed based on prosecutorial misconduct. Flowers v. State, 947 So. 2d 910 (Miss. 2007); Flowers v. State, 842 So. 2d 531, 535 (Miss. 2003); Flowers v. State, 773 So. 2d 309, 312–13 (Miss. 2000). Curtis's other two trials ended in hung juries—the second in 2007 when seven white jurors voted to convict and five black jurors voted to acquit. Brief of Amici Curiae, The Magnolia Bar Association, The Mississippi Center For Justice, and Innocence Project New Orleans at 21. Flowers v. State, No l 7-9572 (U.S. July 26, 2018) (on file with authors). Flowers's fourth conviction, after his sixth trial, was affirmed by the Mississippi Supreme Court, Flowers v. State, 158 So. 3d 1009, 1075–76 (Miss. 2014), but remanded by U.S. Supreme Court for consideration of possible racial discrimination in jury selection, Flowers v. Mississippi, 136 S. Ct. 2157 (2016), and reaffirmed by the Mississippi Supreme Court, Flowers v. State, 240 So. 3d 1082, 1106 (Miss. 2017). On November 2, 2018, the U.S. Supreme Court agreed to review the case. Flowers v. Mississippi, 139 S. Ct. 451 (2018). The case was argued on March 20, 2019. Richard Wolf, *Justices Ponder Racism in Miss. Case*, CLARION LEDGER (Jackson), Mar. 21, 2019, at A4. A decision is awaited.

[999] *See* José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 349 (1998) ("There is a cruel irony in the jury system that the very element of public consensus that gives it its democratic character may, in the same breath, lead to controversial and unjust verdicts that many of us abhor."); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 HARV. L. & POL'Y REV. 149, 150 (2010) ("[P]resent methods of addressing bias in the legal system—particularly in jury selection—which are directed primarily at explicit bias, may only worsen implicit bias."); Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L.J. 507, 508 (1997) ("[I]t is now evident that trial attorneys primarily use peremptory challenges to 'stack the deck' and seat a favorable, rather than impartial, jury."); Morris B. Hoffman,

It also seems reasonable that, since appellate courts view the evidence in the light most favorable to the prosecution, trial juries ought to be instructed to view the evidence in the light most favorable to the accused. Presently juries in criminal cases are instructed that defendants are entitled to a presumption of innocence and that guilt must be proven beyond a reasonable doubt.[1000] We are not suggesting changing the standard of proof, but rather merely that the standard be expressed differently. What does the presumption of innocence mean—if not that the evidence should be viewed in the light most favorable to the defendant? We are confident that the language we propose would result in fewer erroneous convictions if the instruction were given at least three times—during the jury-qualification process, before opening statements, and before the jury retires at the close of evidence.

Regarding evidentiary issues, in our view, no conviction should stand when it probably would not have occurred absent the testimony of a witness who is a proven liar—as a recanting witness is by definition, except under the rarest of circumstances.[1001] A case in point is that of Sonia Jacobs, whose conviction and death sentence rested heavily on the testimony of Walter Norman Rhodes, Jr., who recanted his trial testimony and then recanted his recantation.[1002] All fifty states and the federal government permit perjury convictions solely on proof that materially conflicting statements were made under oath—without regard to which may be true or false.[1003] The same standard should entitle a convicted person to relief upon showing that the sole witness on whose testimony the conviction rested is a liar—which a recantation definitively establishes. Yet judges reviewing cases in which prosecution witnesses have recanted often presume that recantations are inherently unreliable[1004]—as evidenced by the fact that recantations in eleven of the twenty-four cases profiled above have proved insufficient to secure relief.[1005]

An even better idea than endeavoring to persuade judges to take recantations seriously would be to keep the sort of testimony that winds up being recanted out of trials

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Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U. CHI. L. REV. 809, 810 (1997) ("After experiencing peremptory challenges firsthand for six years as a trial judge in a state court of general jurisdiction, I now add my small voice to the chorus calling for abolition."); Tania Tetlow, *Solving* Batson, 56 WM. & MARY L. REV. 1859, 1992 (2015) ("Peremptory challenges function not as an individualized attempt to determine impartiality but rather as an adversarial process that makes use of each side's self-interest.").

[1000] California Pattern Jury Instruction No. 103 says, for example, "A defendant in a criminal case is presumed to be innocent." CAL. PATTERN JURY INSTRUCTIONS NO. 103 (JUD. COUNCIL OF CAL. 2019). This presumption requires the state to prove a defendant guilty "beyond a reasonable doubt." *Id.*

[1001] A recantation can be a retraction of a mistake. For example, Jacques Rivera was exonerated in 2011 of a murder for which he had been in prison in Illinois for twenty-two years, after the only witness who linked him to the crime—a twelve-year-old boy—recanted, saying that, after identifying Rivera, he had seen the killer on the street and realized that he had made a mistake. Ruling of Hon. Neera Walsh at 7, People v. Rivera, 88 CR 15436 (Cir. Ct. of Cook Cty. Sept. 12, 2011) (on file with authors).

[1002] *Supra* profile No. 1.

[1003] Survey of Perjury Statutes by Rob Warden (2015) (on file with authors).

[1004] Warden, *supra* note 46 and accompanying text.

[1005] The cases, in addition to that of Sonia Jacobs, are those of Edward Lee Elmore (*supra* profile No. 4), John George Spirko Jr. (No. 5), Kevin Cooper (No. 6), Jarvis Jay Masters (No. 8), Ha'im Al Matin Sharif (No. 10), Dennis Harold Lawley (No. 13), Tyrone Lee Noling (No. 14), David Ronald Chandler (No. 15), Larry Ray Swearingen (No. 22), and Kimber Edwards (No. 23).

in the first place. Jailhouse informant testimony has proved so notoriously false in cases in which defendants have been exonerated[1006] that a categorical ban on such testimony—which contributed to convictions in ten of our profiled cases[1007]—seems justified.

Another useful reform would be to allow defendants, at their discretion, to introduce polygraph results at their trials.[1008] The fact that the defendant agrees to take the test is in itself probative of innocence. Reliability of the test is beside the point.[1009] Jurors who convicted Tyrone Lee Noling[1010] might have acquitted him had they known that he had agreed to take and passed a polygraph test.[1011] The convictions of Damien Wayne Echols[1012] and his co-defendants might have been avoided if their juries had known that Jessie Lloyd Misskelley, Jr. had taken and passed a polygraph.[1013] Sonia Jacobs[1014] might not have been convicted if the judge in her case had not suppressed a polygraph examiner's exculpatory memo.[1015]

To gain prompt release and avoid retrials, Jacobs and defendants in three of the other profiled cases—Edward Lee Elmore,[1016] Ha'im Al Matin Sharif,[1017] and Damien Wayne Echols[1018]—entered what amounted to coerced pleas under *North Carolina v. Alford.*[1019] In addition, Corey Dewayne Williams agreed to plead guilty in exchange for

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[1006] Brandon L. Garrett, *Convicting the Innocent Redux*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 40, 51 (Daniel S. Medwed ed., 2017) (reporting that 74 convictions, or 22% of 330 convictions in cases in which defendants were exonerated by DNA evidence, rested in part on jailhouse-informant testimony).

[1007] *See supra* profiles Sonia Jacobs (No. 1), Jonathan Bruce Reed (No. 2), Edward Lee Elmore (No. 4), John George Spirko Jr. (No. 5), Kevin Cooper (No. 6), Jarvis Jay Masters (No. 8), Ha'im Al Matin Sharif (No. 10), Walter Ogrod (No. 11), Tyrone Lee Noling (No. 14), and Larry Ray Swearingen (No. 22).

[1008] A forerunner of the modern polygraph was deemed inadmissible nearly a century ago. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that a systolic blood pressure deception test had not gained "standing and scientific recognition among physiological and psychological authorities"), *superseded by* FED. R. EVID. 702, *as stated in* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). In the years since, polygraphs have been banned under the *Frye* standard. *See* James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After* Rock *and* Daubert, 1996 U. ILL. L. REV. 363, 364 (1996) ("American courts have invariably followed *Frye* . . . on the question of admitting polygraph results in[to] evidence.").

[1009] The National Academy of Sciences has noted that, "One role of the polygraph test is to help elicit admissions from people who believe, or are influenced to believe, that it will accurately detect any deception they may attempt. . . . The polygraph test has a useful role independently of whether it can accurately detect deception." NAT'L RESEARCH COUNCIL OF THE NAT'S ACADEMY OF SCIENCES, THE POLYGRAPH AND LIE DETECTION 22 (2003).

[1010] *Supra* profile No. 14.

[1011] *See supra* note 593 and accompanying text.

[1012] *Supra* profile No. 17.

[1013] *Supra* note 691 and accompanying text.

[1014] *Supra* profile No. 1.

[1015] *Supra* note 58 and accompanying text.

[1016] *Supra* profile No. 4.

[1017] *Supra* profile No. 10.

[1018] *Supra* profile No. 17.

[1019] *North Carolina v. Alford*, 400 U.S. 25, 28 n.2 (1970). For a discussion of the coercive effect of plea negotiations for defendants in custody, see David M. Reutter, Alford *Pleas: Prosecutors' Choice for the Wrongfully Convicted*, CRIM. LEGAL NEWS (Nov. 16, 2017),

immediate release while a petition for certiorari in his case was pending before the U.S. Supreme Court.[1020] Prosecutors' willingness to offer and accept such pleas is a tacit acknowledgement that the defendants pose no danger to society. The defendants, thus, ought to be released on personal recognizance while considering the offer—a situation that would remain coercive, but not to the extent that it is for persons in custody. Another way to alleviate the problem would be to establish civil procedures under which persons who enter pleas to gain prompt release could pursue certificates of innocence, restoring their legal innocence and entitling them to pursue compensation for wrongful imprisonment.[1021]

Dubious confessions were involved in five of the profiled cases—those of co-defendants Thomas Jesse Ward and Karl Allen Fontenot,[1022] Walter Ogrod,[1023] Damien Wayne Echols,[1024] Corey Dewayne Williams,[1025] and Kimber Edwards.[1026] In the case of Eddie Lee Howard, Jr., a police officer testified that during interrogation Howard had stated, "I had a temper and that's why this happened."[1027] In recent years, electronic recording of custodial interrogations, a safeguard against police misconduct during interrogations, has been implemented in about half of the states,[1028] but the common, counterintuitive phenomenon of false confessions persists.[1029]

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https://www.criminallegalnews.org/news/2017/nov/16/alford-pleas-prosecutors-choice-wrongfully-convicted/.

[1020] *Supra* profile No. 20.

[1021] Illinois, Kansas, and the District of Columbia have civil procedures under which exonerated persons may obtain certificates of innocence but, to qualify, an applicant's conviction must have been vacated and charges must have been dismissed. D.C. CODE § 2-421 (2017); 735 ILL COMP. STAT. 5/2-702 (2014); KAN. STAT. ANN. § 60-5004 (2018). The laws would have to be amended in order for persons who enter *Alford* pleas to avail themselves to the procedures.

[1022] *Supra* profile No. 7.

[1023] *Supra* profile No. 11.

[1024] *Supra* profile No. 17.

[1025] *Supra* profile No. 20.

[1026] *Supra* profile No. 23.

[1027] *Supra* profile No. 16.

[1028] In 2000, when the Kimber Edwards case (the last of the profiled cases involving a confession) arose, electronic recording was required only in Alaska and Minnesota—by court order. THOMAS P. SULLIVAN, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS 7–8 (2019), https://www.nacdl.org/electronicrecordingproject. Fourteen states (California, Colorado, Illinois, Kansas, Maine, Maryland, Michigan, Missouri, Nebraska, New Mexico, New York, North Carolina, Texas, and Vermont) and the District of Columbia now require electronic recording by law. *Id.* Court orders similar to those that have required electronic recording in Alaska since 1985 and in Minnesota since 1994 now require electronic recording in five additional states (Arkansas, Indiana, Minnesota, New Jersey, and Utah). *Id.* Recording of custodial interrogations is not required in Pennsylvania, but Philadelphia police now record them voluntarily in murder cases. *Id.* at 121.

[1029] Electronic recording has not prevented false confessions in a number of cases, including those of (jurisdiction and crime date in parenthesis) Robert Armstrong (Ariz., 2003), David Alexander Bostick (Fla., 2008), Travis DuBois Sr. (N.D., 2011), Matthew Livers (Neb., 2006), Lorenzo Montoya (Colo., 2000), Travis Rowley (N.M., 2007), James Cox, (Mo. 2007), and Michael Clemens (Ind., 2015). Email from Richard A. Leo, professor of law and psychology, Univ. of S.F., to Rob Warden (Mar. 27, 2019 11:02 CDT) (on file with authors).

The underlying problem is that the standard for admission of confessions into evidence at trial is their voluntariness—not their reliability.[1030] On the latter score, the confessions in our chronicled cases leave much to be desired. In the Ward-Fontenot case, the authorities construed descriptions of dreams as confessions, even though the purported facts in the dreams were significantly at odds with the facts of the crime.[1031] Intellectual limitations known to render suspects vulnerable to psychological interrogation techniques[1032] were manifested in three of the cases—those of Ogrod, who suffered from learning disabilities,[1033] Jessie Lloyd Misskelley, Jr., who was only seventeen and had an IQ of seventy-two when he made the confession that landed Echols on death row,[1034] and Williams, who was only sixteen and had an IQ of sixty-eight when he was interrogated.[1035] The officer who attributed an incriminating remark to Howard had made no contemporaneous note of the alleged admission.[1036]

In medicine, before invasive procedures can be performed, except in emergencies, "informed consent" is required.[1037] If that standard were required in advance of interrogations, few suspects would waive their right to remain silent under *Miranda v. Arizona*.[1038] The American Academy of Child and Adolescent Psychiatry has

[1030] Rogers v. Richmond, 365 U.S. 534, 544 (1961) (holding that a trial judge's attention should focus on whether interrogators' behavior "was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth").

[1031] *Supra* notes 301–06 and accompanying text.

[1032] GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 261 (2003) (stating that mentally handicapped persons "are considered to be 'vulnerable' suspects" and quoting the UK Police & Criminal Justice Act 77-78 (1984): "[M]entally handicapped people [may be] . . . particularly prone in certain circumstances to provide information which is . . . self-incriminating."); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Policy Interrogation*, 53 LAW & PSYCHOL. REV. (2007), at 54, 57-58 (citing cases that, "along with research demonstrating the vulnerability of young people to suggestive and deceptive interrogation techniques, suggest that juvenile false confessions is a serious problem.") Since 1974, more than 500,000 U.S. police officers have been trained in psychological interrogation techniques. John E. Reid & Associates Training Programs, http://www.reid.com/training_programs/r_training.html (last visited May 23, 2019).

[1033] *Supra* notes 440–44 and accompanying text.

[1034] *Supra* notes 690–91 and accompanying text. In the United States, interrogators are allowed to lie to suspects. Oregon v. Mathiason, 429 U.S. 492, 495–96 (1977) (holding that interrogator's lie that petitioner's fingerprints had been found at the crime scene was insufficient to render his confession inadmissible); Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (holding petitioner's confession voluntary even though he had been falsely told during interrogation that a co-suspect had confessed). The practice has been banned in the United Kingdom. CHRISTIAN A. MEISSNER ET AL., CAMPBELL SYSTEMATIC REVIEWS INTERVIEW AND INTERROGATION METHODS AND THEIR EFFECTS ON TRUE AND FALSE CONFESSIONS 11–12 (2012) https://campbellcollaboration.org/media/k2/attachments/Meissner_Interview_Interrogation_Review.pdf.

[1035] *Supra* note 782 and accompanying text.

[1036] *Supra* note 651 and accompanying text.

[1037] *Informed Consent: Code of Medical Ethics Opinion 2.1.1*, AM. MED ASS'N, https://www.ama-assn.org/delivering-care/ethics/informed-consent (last visited May 23, 2019).

[1038] 384 U.S. 436 (1996).

recommended that juvenile suspects have attorneys present during interrogation.[1039] Establishing that as a right for all suspects, regardless of age, would guarantee that statements made during interrogation were genuinely voluntary.

Ten of our profiled cases involved allegations of prosecutorial misconduct[1040]—a scandal of significant proportions that has gone largely unaddressed by the courts.[1041] Various remedies have been suggested, including encouraging judges to comply with existing requirements to report prosecutorial misconduct to disciplinary authorities and requiring prosecutors to implement open-file policies to make exculpatory materials accessible to trial counsel.[1042] Perhaps a more effective remedy would be to avail prosecutors to civil liability for civil rights deprivations under the Civil Rights Act of 1871, which provides that, with the exception of judicial officers acting in their official capacities, "[e]very person" who acts under color of law to deprive another of a constitutional right "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[1043] Despite that inclusive language, the U.S. Supreme Court has exempted prosecutors on the theory that the disciplinary process is sufficient to address the problem.[1044] Experience strongly suggests otherwise, and it seems long past time to hold prosecutors civilly accountable for their misdeeds.

This brings us to one of the criminal justice system's dirtiest little open secrets, which is that juries, as the late Jerome Frank, a renowned legal philosopher and judge of

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[1039] *Interviewing and Interrogating Juvenile Suspects*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Mar. 7, 2013), https://www.aacap.org/aacap/Policy_Statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx (last visited May 23, 2019).

[1040] Those of Sonia Jacobs (profile No. 1) (suppressing polygraph examiner's memo undermining trial testimony of key witness, *supra* note 34 and accompanying text), Jonathan Bruce Reed (No. 2) (telling jury that jailhouse informant's testimony that Reed, in describing the crime, had stated that the victim had a tampon in place, although in fact the tampon had been inserted at the hospital after the attack, and failing to disclose the informant's plea agreement, *supra* notes 85–87 and accompanying text), John George Spirko (No. 5.) (failing to disclose evidence that alleged co-perpetrator had been in Kentucky when the crime occurred in Ohio, *supra* notes 198–202, 211–12 and accompanying text), Kevin Cooper (No. 6) (belated disclosure during trial of exculpatory witness interviews, *supra* notes 257–62 and accompanying text), Walter Ogrod (No. 11) (failing to disclose that two informants had been promised leniency in exchange for their testimony, *supra* notes 495–96 and accompanying text), Dennis Harold Lawley (No. 13) (withholding exculpatory evidence, *supra* note 569 and accompanying text), Tyrone Lee Noling (No. 14) (allegedly coercing witnesses to testify falsely, *supra* note 608 and accompanying text), David Ronald Chandler (No. 15) (threatening witness with electric chair unless he falsely implicated defendant, *supra* note 630 and accompanying text), Corey Dewayne Williams (No. 20) (suppressing exculpatory recordings of witness interviews, *supra* notes 802–04 and accompanying text), and Larry Ray Swearingen (No. 22) (failing to disclose statements of victim's co-workers that she had received threatening telephone calls that the defendant could not have made, *supra* note 879 and accompanying text).

[1041] For an account of the extent of the problem and the failure to address it, see Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals For Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881 (2015).

[1042] *Id.* at 904–39 (providing a thorough discussion of possible reforms).

[1043] 42 U.S.C. § 1983 (2012).

[1044] Imbler v. Pachtman, 424 U.S. 409, 429 (1976) ("[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.").

the U.S. Court of Appeals for the Second Circuit, observed eighty-one years ago, are "hopelessly incompetent as fact-finders"[1045]—an inconvenient truth borne out in the DNA forensic age.[1046] As long as we have juries, surely we ought not entrust them with life-and-death decisions. Nor, of course, should we relegate such decisions to judges like "Maximum Dan" Futch.[1047] That leaves but one option—abolishing capital punishment.

[1045] JEROME FRANK, LAW AND THE MODERN MIND 179–80 (1930).

[1046] *See* EDWARD CONNORS ET AL., NAT'L INST. OF JUST., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (documenting twenty-eight cases in which convicted persons were exonerated by DNA testing).

[1047] *Supra* note 19 and accompanying text.